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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

CLAYTON JACKSON,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari To The Ninth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. DOES THE CONSTITUTIONALLY ROOTED HOLDING OF *MCCORMICK V. UNITED STATES*, 500 U.S. 257 (1991), APPLY TO RICO AS WELL AS HOBBS ACT PROSECUTIONS, AS THE ELEVENTH CIRCUIT HAS HELD, OR CAN A CAMPAIGN CONTRIBUTION BE CRIMINALLY PUNISHED AS A BRIBERY RICO PREDICATE ACT WITHOUT A FINDING IT WAS PART OF A QUID PRO QUO, AS THE NINTH CIRCUIT RULED BELOW?

II. IN A BRIBERY CASE IN WHICH A DEFENDANT WAS PRESSURED BY A POWERFUL ELECTED OFFICIAL ACTING AS AN UNDERCOVER INFORMANT TO LINK CAMPAIGN CONTRIBUTIONS AND PENDING LEGISLATION IN THEIR DISCUSSIONS, BUT IN WHICH NO MONEY PASSED HANDS, IS IT PLAIN ERROR TO FAIL TO REQUIRE THAT THE DEFENDANT HAVE BEEN PREDISPOSED TO BRIBE BEFORE BEING SUBJECTED TO THE GOVERNMENT'S INDUCEMENTS?

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COURT OF APPEALS OPINION

The opinion of the Ninth Circuit Court of Appeals in this matter was initially reported as *United States v. Jackson*, 61 F.3d 1386 (9th Cir. 1995), and as amended is reported at 72 F.2d 1370.

STATEMENT OF JURISDICTION

Petitioner was convicted in the Eastern District of California of RICO (18 U.S.C. § 1962(c)), mail fraud (18 U.S.C. § 1341), and conspiracy (18 U.S.C. § 371) offenses

and was sentenced to 76 months of imprisonment.[1] The Ninth Circuit, having had jurisdiction under 28 U.S.C. § 1291, affirmed. A timely petition for rehearing was denied on December 15, 1995. This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

STATEMENT OF THE PROCEEDINGS

On December 1, 1993, Jackson was convicted in the Eastern District of California of conducting the affairs of an enterprise through a pattern of racketeering, by using his Sacramento lobbying firm to commit (1) mail fraud (18 U.S.C. § 1341), (2) money laundering (18 U.S.C. § 1956), and (3) bribery (California Penal Code § 85). The RICO Count alleged six predicate acts: Acts One through Five alleged violations of state bribery law; Act Six contained mail fraud and money laundering charges, all for the purpose of bribery.[2] Jackson also was convicted of conspiracy to commit mail fraud and eight counts of mail fraud (Counts Two through Ten), all duplicative of allegations contained in Act Six of the RICO charge.

STATEMENT OF FACTS

A. INTRODUCTION

This is a case in which the government charged that petitioner Jackson, a prominent lobbyist for the insurance industry in California, and then state senator-turned-govern-

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[1]The District Court for the Eastern District of California proceeded pursuant to its jurisdiction under 18 U.S.C. § 3231.

[2]The jury reported that it was hung on the first three of the five bribery allegations, but convicted on the RICO charge on the basis of Acts Four to Six.

ment-witness Alan Robbins were engaged in corrupt campaign contribution schemes between 1986 and 1991.

A corporate lawyer specializing in the representation of regulated industries, in the early 1970's Jackson began in earnest to use his legal expertise as a lobbyist. As several state legislators testified, petitioner's knowledge of the insurance industry and its critical role in the state's economy proved a crucial resource for state legislators who often had neither the time nor the inclination to become educated on insurance policy. Leading insurance industry figures relied heavily on Jackson to promote their views on pending legislation. Until this case, Jackson had never been accused of unethical or illegal activity in his profession.

As chair of the Senate Insurance Committee, Alan Robbins was one of California's most powerful lawmakers. The power of a legislative chair over those required to appear before him is readily apparent: to affect pending insurance legislation, one had to see Robbins. Alan Robbins was also corrupt. During the 1980's, he used his position to extort money from those required by the senator's power to discuss legislation with him, and ran a money laundering operation out of his legislative office.

In August 1988, the FBI for the first time confronted the senator. When it became clear the federal government was aware of illegal activities on his part (none of which involved Jackson), Robbins obstructed justice by directing his associates to destroy documents, to lie to the FBI, and to commit grand jury perjury. He paid others to lie and to destroy evidence. Robbins admitted lying to the FBI[3] and the grand jury prior to his decision to cooperate with the government. In June 1991, facing imminent indictment and a long prison term, Robbins agreed to plead guilty to racketeering charges

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[3]Lead FBI agent Wedick described Robbins as "one of the most evasive people" he had ever questioned.

and, as FBI agent James Wedick put it, to "work off his beef."

Rather than exposing the senator and forcing him out of office, the FBI turned Robbins into its highly-motivated secret agent, charged with the task — at the peril of having his bargain revoked — of generating evidence on high-level targets as to whom the FBI had no previous incriminating evidence. Robbins was told he would have to deliver a significant "catch" to reduce his sentence. According to Robbins, the government suggested Clay Jackson as a target. While Jackson's clients previously had given Robbins small and legally reported campaign contributions, the government had no evidence of prior wrongdoing on Jackson's part.

The plan was simple. The FBI instructed the senator, the powerful chair of a committee of critical importance to Jackson's clients, to demand money from petitioner repeatedly, conduct proscribed by law. A lenient sentence for Robbins was contingent on his willingness to do the government's bidding. The hope was Jackson would respond with a cash payment. After Robbins extorted him for large payoffs in taped conversations in the last half of 1991, Jackson discussed money with the powerful politician, but never gave him a nickel.

The focus of the entire case against Jackson was campaign contributions. As will now be demonstrated, the proper resolution of every allegation against Jackson required a correct understanding of the line separating bribery from constitutionally protected free speech, i.e., the difference between a campaign contribution exchanged for a specific official action and one made in the general hope of influencing a legislator's position on the issues before him.

B. THE ALLEGED OFFENSES

1. The Worker's Compensation Rate Bill (Act Five; Bribery)

Although it came last in time, Act Five — the "tape" charge — was the cornerstone of the government's case, as it was the only charge as to which the government offered corroboration of its sleazy key witness. Furthermore, as the district court noted at trial, the Act Five bribery charge, "even though one-sixth of Count One[,] probably constituted eighty percent of this trial."

The tapes of the 1991 meetings between Jackson and Robbins reveal Jackson lobbied Robbins, a key senator, on a bill of critical importance to an industry, on the basis of powerful and technical policy arguments. It was Robbins who first asked Jackson to "quantify" the issue's importance, and Jackson initially responded with lengthy policy reasoning. It was only after repeated urging by Robbins that Jackson suggested a large contribution figure.

Robbins asked Jackson to come up with a way to pass money outside his campaign committee, but it was the senator thereafter who suggested solutions of dubious legality, such as giving money outside his committee to his lawyer or a fictional person conjured up by the F.B.I. The point of these suggestions was to induce Jackson to *do* something illegal. Yet, despite the governments's continuation of the tape-recorded sting for months, Jackson never confirmed any past illegality with Robbins nor passed him money, consistent with his defense that he never bribed or had any intent to bribe Robbins, but rather mollified the senator with empty talk of mega-contributions to avoid his wrath. The Ninth Circuit agreed that, as to the charge supported by the tapes, "the jury could have concluded that Jackson lacked the intent to offer a bribe on this record." 72 F.3d at 1381.

2. The Carpenter Counts (RICO Act VI, Counts II-X; Mail Fraud, Money Laundering)

This group of counts alleged a past Robbins scheme to launder campaign contributions for bribery. According to Robbins, he and Jackson had agreed in 1986 that Robbins would receive contributions made by Jackson's clients to Paul Carpenter, then a state senator, later a member of the powerful Board of Equalization, which set state tax rates. Robbins testified he and Carpenter agreed to move funds from Carpenter to himself through the Goddard Company, a public relations firm. Jackson was not present at the Robbins-Carpenter conversation, and Robbins did not tell Jackson thereafter about the Goddard Company.

While there was ample evidence *Carpenter* had conferred and agreed with Robbins as to the illegal Goddard diversion, the only evidence Jackson knew anything of money going from Carpenter through Goddard to Robbins for his personal use came from Robbins, a conceded perjurer ready to lie for the benefits the government awarded him.[4] In his testimony, Jackson agreed he recommended that his clients make fully reported campaign contributions to Paul Carpenter between 1986 and 1989; Jackson asserted, however, that he then knew nothing of Robbins' illegal intentions in general or any arrangement between Carpenter and Robbins to launder money from the former to the latter through the Goddard Company.

Furthermore, even if Jackson knew Carpenter and Robbins had agreed to pass campaign contributions from the former to the latter, that fact in itself would suggest no illegality. The government has never disputed, and cannot, that a transfer of contributions between campaign committees of candidates from the same party is both legal and

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[4]Jennifer Goddard, a key player in the scheme and government witness, said she had never heard of Jackson.

common in California.[5] Thus to meet its burden on this count, as the Court of Appeals recognized, the government had to prove Jackson intended "to pass donations from insurance companies through Carpenter *and Goddard* to Robbins *as a bribe*." *Jackson*, 72 F.3d at 1382 (emphasis added).

A jury instructed as to the requirement of a quid pro quo for bribery and of the general legality of inter-candidate transfers could have believed much or all of Robbins' testimony and yet acquitted Jackson of mail fraud and laundering charges. A jury ignorant of the scope of the right to make political contributions and of the legitimacy of inter-candidate transfers, however, could have convicted Jackson solely because he made legitimate contributions to Carpenter in the hope or expectation of influencing either Carpenter, Robbins, or both.

3. The Marriott Contribution (RICO Act IV; Bribery)

In the spring of 1988 Jackson, on behalf of the Marriott Corporation, urged Robbins to vote against a bill; Robbins did so; the bill passed nonetheless; the Governor vetoed it; and months afterwards Robbins, along with a substantial number of other legislators, received a fully disclosed and legally reported $2,000 campaign contribution from the Marriott Corporation.

The only evidence Jackson even mentioned campaign contributions in lobbying came from Robbins. Even Robbins did not claim that Jackson in lobbying him promised a contribution of any particular amount, or that Robbins

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[5] *See Service Employees v. Fair Political Practices Commission*, 955 F.2d 1312 (9th Cir. 1992), *affirming* 721 F.Supp. 1172 (E.D.Cal. 1989) *and* 747 F.Supp. 580 (E.D.Cal. 1990) (intercandidate and intracandidate transfers of funds are protected by the First Amendment, validating the use of campaign committees to collect funds in the name of one person or entity to be given to another).

promised unconditional support to Jackson on the bill in question; according to Robbins, he rather had indicated to Jackson that he would support his clients where "politically feasible."

Thus a jury that understood contributing money to influence legislators is legal absent a "clear and unambiguous" quid pro quo could have believed Robbins' testimony and still easily acquitted for lack of an "explicit promise." Conversely, a jury that believed illegal any contribution made in the hope or expectation of legislative influence, while rejecting Robbins' testimony entirely, would convict Jackson simply because he tried to influence Robbins, albeit in a constitutionally protected manner.

C. THE INSTRUCTIONS

In instructing the jury on the elements of the bribery charges found in all predicate acts of the Count One RICO charge, the district court stated those offenses comprised giving or offering a bribe to any member of the California Legislature (Cal. Penal Code § 85), defining a bribe in the language of California Penal Code § 7(6) as

> anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to influence, unlawfully, the person to whom it is given, in his action, vote, or opinion, in any public or official capacity.

"Corrupt[ly]" was defined — based on California Penal Code § 7(3) — as "a wrongful design to acquire or cause some pecuniary or other advantage." The district court then instructed on a definition of "knowingly" found in the California Penal Code but never applied in that state's caselaw to the crime of bribery: "An act is done knowingly if the defendant is aware of the act and does not act through ignorance, mistake, or accident. *The government is not required to prove that the defendant knew that his acts or*

omissions were unlawful." The court thus defined bribery as a corrupt, wrongful or unlawful giving to a legislator with the intent to influence his action in his official capacity, which need not be known by the giver to be unlawful.

Jackson's counsel requested several instructions based on California and federal precedents defining legally permissible lobbying and campaign contributions,[6] and stating what distinguishes a legitimate campaign contribution from a bribe. These were refused.[7]

The district court defaulted on an initial promise to instruct on language requested by Jackson to the effect that "it must be clear that the payment was made in return for an explicit promise or undertaking by an official to perform or not to perform an official act," and also refused the defense request to instruct that bribery requires a "quid pro quo." The jury was thus instructed that an attempt to influence a

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[6] *See* Jackson's Requested Instruction 2 (lobbying legal in California); Jackson's 3 (fact that lobbyist recommended to clients making campaign contributions with expectation of obtaining special influence and access or with generalized expectation of benefit, without more, not bribery); Jackson's 4 and 5 (campaign contribution cannot be bribe unless clear and unambiguous "quid pro quo" exists, in that "the payment must be made in return for an explicit promise or undertaking by the official to perform or not to perform an official act. . . ."); Jackson's 6 (soliciting political contributions protected by Constitution, and contributions can be unlimited under California law if properly reported); Jackson's 7 (lobbyists can recommend to clients that they make contributions to specific officials); Jackson's 8 (legal in California to receive contributions outside Capitol).

[7] Even though the bribery acts were state offenses defined by reference to the California Penal Code, the district court rejected proffered defense instructions based on California cases, saying that it did not want the jury "comparing" or "weighing California law versus federal law." As to the defense instructions based on federal decisional law, including opinions of this Court, the district court about-faced, refusing them on the ground that it would not read federal law principles into "California statutory bribery law."

legislator by a campaign contribution constituted bribery if unlawful, corrupt, or wrongful, but was not informed that attempts to influence could not be unlawful, corrupt, or wrongful unless part of a quid pro quo.

SUMMARY OF ARGUMENT

The opinion below conflicts with decisions of this Court, other circuits, and of the Ninth Circuit itself on a First Amendment issue at the core of our democratic political system. Whether as individuals or as part of interest groups, small or large, citizens have a constitutional right to seek to influence holders of and candidates for state office by financially supporting their political campaigns. Yet *Jackson* holds that such campaign contributions can be criminally punished as racketeering activity without a finding that they were given as part of a quid pro quo.

Furthermore, the Court of Appeals has held that to be convicted of a state bribery offense charged as a RICO predicate act, the maker of the political contribution need not know his act is unlawful, if he possesses no more than a "wrongful design." Any contribution made in the hope of influencing legislators in one direction can and often is considered dreadfully "wrongful" by those who hold a precisely contrary view of the merits of the law and politics in question. It is the requirement of an explicit quid pro quo, fashioned in the context of federal anti-corruption legislation, that allows a citizen or organization to engage in constitutionally protected financial support of controversial legislation or candidates without fear of criminal prosecution and conviction by prosecutors or juries hostile to the donor's political perspective. *McCormick v. United States*, 500 U.S. 257 (1991).

Although other circuits have reached a contrary result, the Ninth Circuit's opinion in *Jackson* rejected the applicability of *McCormick's* quid pro quo requirement to Califor-

nia's bribery statute by simply stating that "we decline to read such a requirement into First Amendment jurisprudence today." 72 F.3d at 1376. Sooner or later, this Court must resolve the inter-circuit conflict created by *Jackson*. It should do so now, so that all who support political candidates, be it through massive political action donations or five dollar direct mailing contributions, can understand the limit of their First Amendment rights and tailor their actions accordingly.

The Court should also decide an important issue arising from its decision in *Jacobson v. United States*, 503 U.S. 540 (1992). In this case, the key charge centered on discussions between a well-respected lobbyist and a powerful but corrupt state senator who had agreed with the FBI to set up the lobbyist to gain leniency on the charges facing the senator. The legislator-informant succeeded in taped conversations in inducing the lobbyist to link talk of political donations and of pending legislation, but failed to squeeze any payment whatsoever from his target; the pivotal accusation in the case thus implicated pure speech. Not only was the jury uninformed that a quid pro quo had to be located in such speech before it could serve as a basis for a bribery conviction, it was not instructed that a predisposition to bribe on the defendant's part had to precede the governmental inducements, as *Jacobson* requires. In a case in which a citizen faces imprisonment solely for speaking words the government went to great lengths to have him utter, an instruction on the *Jacobson* principle is critical to a fair verdict on guilt or innocence.

REASONS FOR GRANTING CERTIORARI

I.

THE OPINION BELOW CONFLICTS WITH PRECEDENTS OF OTHER CIRCUITS APPLYING *McCORMICK'S* QUID PRO QUO REQUIREMENT TO STATE BRIBERY STATUTES, AND PERMITS THE CRIMINALIZATION OF CONSTITUTIONALLY PROTECTED CONDUCT

McCormick rests upon a fundamental truth about the American electoral process — it runs to a great extent on money given to legislators and candidates in the hope of having influence on the recipients and on public policy.[8] When the money is given through lobbyists, some may feel a sense of distaste for the participants, particularly when the legislator and those seeking to exert influence are speaking privately and bluntly. Nonetheless, because giving money in the general hope of exerting influence is constitutionally protected, a state bribery statute must be interpreted so as not to punish such behavior.

To be punishable, the giving must be corrupt, in the sense that it is for a specific quid pro quo — thus setting the case apart from any general desire to influence. This quid pro quo requirement has two parts — first, there must be a bargain, and second, the parties must intend that there be a bargain. *See Evans v. United States*, 119 L.Ed 2d 57, 79 (1992) (Kennedy, J., concurring) ("[G]iven a corrupt motive, the quid pro quo . . . is the essence of the [Hobbs Act] offense.")

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[8] *See FEC v. National Conservative PAC*, 470 U.S. 480 (1985); *Institute of Governmental Advocates v. Younger*, 70 Cal.App.3d 878 (1977); *Service Employees v. Fair Political Practices Commission*, 955 F.2d 1312 (9th Cir. 1992), *affirming* 721 F.Supp. 1172 (E.D.Cal. 1989) *and* 747 F.Supp. 580 (E.D.Cal. 1990).

The opinion below rejects the first part of a quid pro quo requirement by refusing to obey *McCormick's* teaching,[9] placing the Ninth Circuit in conflict with other circuits. *Jackson* rejects the second part by reading out of the California bribery statute any specific intent requirement that lurks in its language, thereby making certain that the statute can reach speech or conduct protected by the First Amendment.

A. The Panel's Opinion Conflicts With Other Circuits' Application of *McCormick* To State Bribery Statutes.

In *McCormick*, a prosecution under the Hobbs Act (18 U.S.C. § 1951), this Court considered the elements required to convict a state official of extortion upon the basis of his receipt of a campaign contribution. All members of the Court agreed that receipt of such a contribution could only violate the Act "if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." 500 U.S. at 273.[10] *McCormick* did not locate this "quid pro quo" element in either the language or the legislative history of the Hobbs Act, but in the need to tailor its reach to avoid infringement of the historically established and constitutionally protected right of citizens to advance their viewpoints by financially sup-

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[9]The *Jackson* court reached the issue of whether a quid pro quo is constitutionally required after holding that "California bribery law does not require an explicit quid pro quo instruction . . ." 72 F.3d at 1378. The panel cited no California court decision to that effect, however, and none exists.

[10]While the vote to reverse McCormick's Hobbs Act conviction was not unanimous, the dissenters agreed that "it is essential that the payment in question be contingent on a mutual understanding that the motivation for the payment is the payer's desire to avoid a specific threatened harm or to obtain a promised benefit that the defendant has the apparent power to deliver. . . . In this sense, the crime does require a 'quid pro quo.'" 500 U.S. at 283 (Stevens, J., dissenting).

porting the campaigns of candidates sympathetic to those views.[11]

> Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done. Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant [in passing the Hobbs Act]. To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation.

500 U.S. at 272.

In this case, as in *McCormick*, the federal government has sought to punish as criminal the giving of campaign contributions to a state legislator. Whether a defendant is charged under RICO with violation of state bribery laws, or under the Hobbs Act, ought to be immaterial; it is irrational to conclude that the constitutional considerations limiting

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[11] "§ 1951 contains not even a colorable allusion to campaign contributions or quid pro quos." 500 U.S. at 277 (Scalia, J., concurring); *see also Evans*, 119 L.Ed.2d at 84 (Thomas, dissenting): quid pro quo requirement of *McCormick* not located in "the common law or statutory text," but rather "imposed to prevent the Hobbs Act from effecting a radical (and absurd) change in American political life."

Hobbs Act prosecutions directed at a campaign contribution do not apply equally to RICO predicate charges directed at the same contribution.[12]

For that reason, other federal courts that have dealt with the applicability of *McCormick* to state bribery statutes have held or stated that the criminalization of campaign contributions requires a constitutionally conditioned element of a quid pro quo. *United States v. Martinez*, 14 F.3d 543, 553 n.5 (11th Cir. 1994) (because the substance of the subpredicate acts involving bribery under Florida law is essentially the same as extortion under the Hobbs Act, *McCormick* applies, and failure to instruct on quid pro quo requires reversal of RICO predicate convictions under state bribery law); *United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993) (noting applicability of quid pro quo to state bribery statutes, court states: "Given the minimal difference between extortion under color of right and bribery, it would seem that courts should exercise the same restraint in interpreting bribery statutes as the *McCormick* Court did in interpreting the Hobbs Act: absent some fairly explicit language otherwise, accepting a campaign contribution does not equal taking a bribe unless the payment is made in exchange for an explicit promise to perform or not perform an official act."); *see also United States v. Arthur*, 544 F.2d 730, 734 (4th Cir. 1976), citing *United States v. Brewster*, 506 F.2d 62, 81 (D.C. Cir. 1974) (district court's failure to require quid pro quo as element of bribery permitted jury to convict bank official of misapplication of bank funds on

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[12]That is particularly so because RICO penalties equal or exceed those contained in the Hobbs Act. "Congress has drawn a distinction between varying degrees of official corruption and has chosen the quid pro quo requirement to separate those crimes warranting severe sanctions from those justifying a lighter punishment." Hager, "The Hobbs Act: Maintaining The Distinction Between A Bribe And A Gift", 83 Kent. L.J. 197 (1994-95).

basis of legitimate "goodwill" expenditures to public officials, requiring reversal).

The *Jackson* opinion states that "the First Amendment does not imply an explicit quid pro quo element into every state bribery case"; it cites no case that so holds, nor does it offer any reason why *McCormick* should not be so read, at least where campaign contributions are at issue. The Court should decide this issue of great political importance in the same manner as the Eleventh Circuit has.

B. By Eliminating Any Element Of Knowledge Of Illegality From The Bribery Statute, And By Defining A "Corrupt Intent" Circularly As "Wrongful Design," The *Jackson* Opinion Permits A Campaign Contributor To Be Convicted Of Bribery For The Constitutionally Protected Act Of Attempting To Influence A Legislator.

Jackson argued his conviction for bribery required a jury finding that he knew the campaign contributions he arranged were illegal. Such a mental state element might well eliminate the problem of overbreadth otherwise posed by the California bribery statute. The panel rejected the claim, however, asserting that under the 1910 California Supreme Court decision in *People v. Glass*, 158 Cal. 650, "section 85 requires an intent to influence corruptly only." 72 F.3d at 1377.[13]

The panel then rejected Jackson's claim under *United States v. Dorri*, 15 F.3d 888, 894-95 (9th Cir. 1994), that the term "corrupt" was defined tautologically as "unlawful," and thus was meaningless. The circuit held that "corruptly"

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[13] In 1910, not only had *McCormick* not been decided, but this Court had yet to apply the First Amendment to the states. *See Gitlow v. New York*, 268 U.S. 652 (1925).

was also defined as a "wrongful design." "On these instructions, then, there is no circularity." 72 F.3d at 1377.

To define "corrupt" as "wrongful" is as circular as to define it as "unlawful." Unlike "explicit promise," these three terms are adjectives without defined content, leaving juries and prosecutors free to punish contributions and contributors that support disfavored causes and candidates. A statute that punishes all attempts to influence legislators "wrongfully" is unconstitutional, unless, contrary to the circuit's view, a quid pro quo requirement is read into "corruptly" or "wrongfully."[14] It is no answer to this problem to assert that the California bribery statute was defined at Jackson's trial as it was eighty five years ago, when state law was not constrained by the First Amendment or *McCormick*.

Furthermore, by refusing Jackson's various instructions as to what is indisputably legal political activity in California — lobbying; recommending campaign contributions to specific legislators with the expectation of obtaining special influence and access or with generalized expectation of benefit; soliciting unlimited campaign contributions; and receiving political contributions outside the Capitol — the district court failed to distinguish bribery from legal forms of political activity "with sufficient clarity to enable the jury to determine the legality of appellant's activities. *Arthur*, 544 F.2d at 735. That "error is not harmless because it created a

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[14] At another point in its opinion, the panel apparently senses this danger, stating that the California bribery statute criminalizes "the sort of implicit quid pro quo that is the essence of bribery . . . ." 72 F.3d at 1380. The jury, however, was given no instruction that required it to find any kind of quid pro quo, explicit or implicit. If there is indeed an "implicit quid pro quo" element in the statute, Jackson's convictions must be reversed due to the failure to submit that element to the jury. *United States v. Gaudin*, 132 L.Ed.2d 444 (1995); *United States v. Gaudin*, 28 F.3d 943 (1994).

reasonable possibility that [petitioner] was convicted for activity that is not a crime." *United States v. Carpenter*, 961 F.2d 824, 826 (9th Cir. 1992) (reversing Hobbs Act convictions for failure to instruct on quid pro quo requirement). The danger to the First Amendment posed by the rulings below more than justify a grant of certiorari.

II.

IN THE CONTEXT OF THE FIRST AMENDMENT ISSUES POSED ABOVE, THE FAILURE OF THE DISTRICT COURT TO INSTRUCT THE JURY IN ACCORDANCE WITH THE TEACHINGS OF *JACOBSON* MERITS THIS COURT'S REVIEW

Jackson was tried and convicted on the central charge in this case — RICO Act Five — not because he gave a politician money for his vote, but because he acceded to a powerful legislator's pressure in their discussions to link a large campaign contribution to pending legislation. After expressly acknowledging the evidence that Jackson had been entrapped into holding such discussions required instruction on that defense, the district court gave the following charge: "A person is entrapped when the person has no previous intention to violate the law and is persuaded to commit a crime by government agents." "On the other hand, where a person is already willing to commit a crime, it is not entrapment if the government agents merely provide an opportunity to commit the crime."

Missing from the instruction was the critical language of *Jacobson v. United States*, 503 U.S. 540 (1992), requiring the government to demonstrate beyond a reasonable doubt the defendant's predisposition to criminality *prior to contact by government agents*; present is the term "already" which has been condemned as inconsistent with *Jacobson*. *See United States v. Mkhsian*, 5 F.3d 1306 (9th Cir. 1993).

The panel below agreed the trial judge committed instructional error; yet it deemed the error harmless because "there was extremely strong evidence that Jackson engaged in bribery and money laundering schemes prior to the time Robbins began to act as a government agent." 72 F.3d at 1378.[15]

In fact, since eighty percent of the evidence in the case involved Act Five, it is highly probable the jury focused its deliberations on that charge and, having found pursuant to the erroneous entrapment instructions that Jackson bribed Robbins there, used that finding to convict on the other charges, all of which were based on uncorroborated allegations. The entrapment instructional error on Act Five, rather than being cured by the other convictions, tainted the entire judgment.

Clay Jackson and his clients were forced by Robbins' position to talk legislation with him. Robbins' power likewise required that those who lobbied him try to appease him during those discussions, leaving them vulnerable to his efforts to draw them into legally dangerous waters. In such a context, it is simply wrong to hold that a jury can accurately decide the issue of guilt and innocence without reference to the *Jacobson* principle, particularly in the face of such

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[15]This "extremely strong evidence" language was used in the Ninth Circuit's original opinion, in which the panel grossly misread the evidentiary record, stating the taped conversations between Robbins and Jackson happened in 1986, before Jackson's clients contributed money to Carpenter and Robbins. *See United States v. Jackson*, 61 F.3d 1386, *amended by*, 72 F.3d 1370. Such a chronology would indeed have been damning, but in fact Jackson passed no money to Robbins after the senator extorted him on tape in 1991. Although correcting the blatant factual errors in its initial opinion on rehearing, the panel's amended decision retained the language overstating the strength of the government's case.

substantial incentives given by the government to its only witness.[16]

CONCLUSION

For the reasons stated, this Court should grant certiorari in this matter to involve two important issues of law.

Dated: March 14, 1996

Respectfully submitted,

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Attorneys For Petitioner
Clayton R. Jackson

[16] As a reward for serving as its witness prior to Jackson's trial, the federal government had Robbins' sentence cut to two years, and agreed not to pursue asset forfeiture or civil RICO claims which would have resulted in his personal bankruptcy, choosing instead to leave Robbins with a multi-million dollar fortune.

APPENDIX A

No. 94-10095

United States Court of Appeals,
Ninth Circuit.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CLAYTON R. JACKSON,
Defendant-Appellant.

Argued and Submitted April 12, 1995.

Decided July 25, 1995.

As Amended on Denial of Rehearing and
Rehearing en Banc December 15, 1995.*

Defendant was convicted in the United States District Court for the Eastern District of California, Edward J. Garcia, J., of racketeering, conspiracy to commit mail fraud and money laundering, and mail fraud in connection with offering of bribes to state senator. Defendant appealed. The Court of Appeals, Goodwin, Circuit Judge, held that: (1) California bribery statute does not require explicit quid pro quo; (2) bribery statute did not require that defendant intend to break the law; (3) entrapment instruction was proper; (4) court did not abuse its discretion in excluding defendant's proposed instructions; (5) evidence was sufficient to sustain convictions; and (6) court was not required to give unanimity instructions.

Affirmed.

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* Judge Hug voted to reject the suggestion for rehearing en banc and Judges Gibson and Goodwin so recommended.

Hug, Circuit Judge, voted to reject suggestion for rehearing en banc.

Gibson and Goodwin, Circuit Judges, recommended rejection of suggestion for rehearing en banc.

1. Criminal Law — 1134(3)

Issue of whether quid pro quo element is required for bribery conviction was one of law for purposes of determining standard of review.

2. Criminal Law — 1038.2, 1043(1)

Even absent formal objection to rejection of defendant's proposed instruction, defendant adequately preserved for appeal claim that bribery statute required quid pro quo element where he argued his quid pro quo point throughout and offered alternative instruction.

3. Bribery — 1(1)

Constitutional Law — 91

First Amendment does not imply explicit quid pro quo element into every state bribery offense. U.S.C.A. Const.Amend. 1.

4. Bribery — 14

California law does not require explicit quid pro quo instruction in prosecution for bribery. West's Ann.Cal.Penal Code § 85.

5. Criminal Law — 1139

Whether state bribery statute requires defendant to know that his acts were unlawful is question of law subject to de novo review.

6. Criminal Law — 1038.1(4)

Where defendant did not object to instructions on knowledge, wording of instructions as contradictory or circular would be reviewed for plain error only.

7. Bribery — 1(1)

For purposes of interpreting California bribery statutes, "unlawfully" means same thing as corruptly, and defendant need not intend to break law to violate statute. West's Ann.Cal.Penal Code § 85.

See publication Words and Phrases for other judicial constructions and definitions.

8. Bribery — 14

There was no circularity in bribery instructions which defined "unlawfully" as "corruptly" and defined "corruptly" as "wrongful design."

9. Criminal Law — 772(6)

Instruction that there is no entrapment if government agents merely provide opportunity to commit the crime to person who was already willing to commit the crime was defective due to ambiguity of the word "already," the impression of which permits jury to convict without showing by government that defendant was disposed to commit crime prior to contact with government agents.

10. Criminal Law — 1038.1(4)

Defect in entrapment instruction would be reviewed for plain error, even though defendant failed to object.

11. Criminal Law — 1038.1(4)

Giving of entrapment instruction which referred to person who was "already" willing to commit crime was not plain

error in racketeering prosecution in view of fact that jury found defendant guilty of offenses similar to predicate offenses which occurred prior to predicate offenses.

12. Criminal Law — 1038.1(4)

Where evidence virtually compels finding that defendant was predisposed, so that jury would have found him predisposed in any event, no plain error exists in entrapment instruction which refers to person who is "already" willing to commit a crime.

13. Criminal Law — 1139, 1152(1)

Whether district court's rejection of defendant's proposed instruction is reviewed de novo or for abuse of discretion is undetermined in the Ninth Circuit.

14. Criminal Law — 829(1)

Court is not required to give instruction on point already adequately covered by another instruction.

15. Criminal Law — 829(3)

Where court gave adequate instruction defining elements of bribery and gave two instructions contrasting bribery with legal lobbying activity, it was not error to decline defendant's requested instructions on other indisputably legal activity which was not in issue.

16. Criminal Law — 811(4), 829(4)

Court did not err in rejecting defendant's proposed instructions which would have repeated specifics of his theories, running risk of biasing instructions in favor of defendant, where instructions actually given adequately covered law on both defendant's entrapment and extortion theories.

17. Criminal Law — 829(3)

Where defendant's theory turns on lack of intent, jury instructions that adequately reflect intent required for offense obviate need for specific instructions on innocent states of mind.

18. Criminal Law — 1139

Sufficiency of indictment is reviewed de novo.

19. Indictment and Information — 60, 110(3)

Indictment is insufficient if it does not contain necessary elements of crime alleged, but indictment that tracks words of statute violated is generally sufficient, so long as implied, necessary elements not present in statutory language are included.

20. Indictment and Information — 110(3)

Where statutory language and instructions adequately stated elements required for offense, and indictment incorporated relevant statute, indictment was sufficient.

21. Criminal Law — 552(1)

Circumstantial evidence and inferences drawn from it may be sufficient to sustain conviction.

22. Criminal Law — 1044.2(2)

Even though defendant did not renew motion for acquittal at close of case, sufficiency of evidence was not limited to plain error review where court did not rule on acquittal motion until after jury returned its verdicts.

23. Bribery — 1(1)

Whether bribe was actually delivered is irrelevant to issue of whether bribe was offered in violation of California law. West's Ann.Cal.Penal Code § 85.

24. Criminal Law — 446

Defendant's racketeering conviction based on offering of bribe in violation of state law was supported by tape recording of conversations between defendant, a lobbyist, and state senator. 18 U.S.C.A. § 1962(c); West's Ann.Cal.Penal Code § 85.

25. Postal Service — 48 (4.4)

Indictment which alleged that, as part of scheme to defraud and obtain money by means of false pretenses, defendant induced unsuspecting lobbying clients to make campaign contributions to official's campaign committee when defendant knew that substantial portion of contributions were not for benefit of that official but would be directed to benefit of another official adequately encompassed, as part of defendant's mail fraud, the misrepresentation of political status of official for whose campaign committee the money was ostensibly solicited.

26. Indictment and Information — 117

Indictments should not be read so narrowly that they must explicitly include every particular argument or bit of evidence that prosecutor may offer at trial.

27. Criminal Law — 798(.5)

There was no need for unanimity instructions with respect to mail fraud charges where only one scheme was presented to jury. 18 U.S.C.A. § 1341.

28. Criminal Law — 1173.3

Any possible prejudice to defendant due to lack of unanimity instruction with respect to mailings which formed predicates for racketeering convictions was removed by fact that defendant was convicted of mail fraud with respect to same mailings, thus showing that jurors unanimously agreed on mailings.

29. Criminal Law — 772(1), 1173.2(2)

Court's failure to orally instruct jury on elements of charged offenses cannot be cured by making written indictment available to jury.

30. Criminal Law — 822(1)

Lack of emphasis of particular theory presented by defense did not render instructions as a whole improper.

31. Postal Service — 35(5)

Jurors could infer defendant's knowledge that official would mail campaign reports to Secretary of State in pursuance of bribery scheme from fact that whole aim of arrangement was to get bribe money through that official to another official and that, in order for scheme to work, first official would have to falsify campaign reports to account for money. 18 U.S.C.A. § 1341.

32. United States — 34

Crime of money laundering in connection with bribery of state official did not require jury to find that defendant knew that money funneled to state official would be used for his personal use. 18 U.S.C.A. § 1956.

33. Bribery — 1(2)
Postal Service — 35(5)

Neither crime of mail fraud nor bribery required finding that defendant knew that state senator to whom he was making payments would put proceeds to personal use. 18 U.S.C.A. § 1341; West's Ann.Cal.Penal Code § 85.

34. Criminal Law — 872.5

To convict defendant of money laundering, all jurors had to agree that defendant was culpable for same particular act. 18 U.S.C.A. § 1956.

35. Criminal Law — 1038.2

Any error in lack of unanimity instruction with respect to which acts constituted money laundering was not plain error where each of specific transactions charged documented same part of money laundering scheme and, if defendant was culpable for one check, he would be culpable for all of them. 18 U.S.C.A. § 1956.

36. United States — 34

In order for defendant to be convicted of money laundering on basis of bribing of state official, it was not necessary that defendant know of role of one participant in scheme so long as it was shown that he initiated, concluded, or participated in initiation or conclusion of transaction. 18 U.S.C.A. § 1956.

37. Criminal Law — 59(5)

It is not necessary for aider and abettor to know who actually committed crime.

Dennis P. Riordan, Riordan & Rosenthal, San Francisco, California and Michael Tigar, University of Texas School of Law, Austin, Texas, for defendant-appellant.

John K. Vincent, Assistant United States Attorney, Sacramento, California, for plaintiff-appellee.

Appeal from the United States District Court for the Eastern District of California.

Before: FLOYD R. GIBSON**, GOODWIN, and HUG, Circuit Judges.

GOODWIN, Circuit Judge:

Clayton Jackson was convicted of racketeering (18 U.S.C.A. § 1962(c)), conspiracy to commit mail fraud and money laundering (18 U.S.C.A. §§ 1956 and 1341), and mail fraud (18 U.S.C.A. § 1341) for his part in offering bribes to California state Senator Alan Robbins and establishing a money laundering scheme to funnel the money fraudulently obtained from Jackson's clients to Robbins through California state Senator Paul Carpenter. He appeals.

Jackson's primary contention is that existing caselaw requires the jury to find an explicit quid pro quo to convict Jackson of the racketeering charges predicated on violation of a California bribery statute. The appeal also asserts instructional errors and evidentiary shortcomings, none of which justifies reversal. We affirm.

I. BACKGROUND

Clayton Jackson, a prominent lobbyist for the insurance industry, was indicted in a sweeping federal investigation of corruption in Sacramento. Senator Alan Robbins, who was convicted on similar charges, was the Chairman of the

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** The Honorable Floyd R. Gibson, Senior Circuit Judge for the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Senate Insurance Committee. The following summaries set out the facts underlying each of Jackson's convictions.

A. *Racketeering Act 4 — Senate Bill 1719*

In Racketeering Act 4, the indictment charged Jackson with offering a bribe to Robbins in the form of campaign contributions in exchange for Robbins' assistance in defeating Senate Bill 1719 in early 1988. The governor vetoed the bill after both houses had passed it. Robbins then sent Jackson a letter and newspaper articles chronicling Robbins' action against SB 1719. Shortly thereafter, Jackson's client, who would have been adversely affected by the passage of SB 1719, donated $2,000 to Robbins.

B. *Racketeering Act 5 — Workers' Compensation*

During the course of tape-recorded conversations, Jackson offered Robbins a $250,000 bribe. (Unknown to Jackson, Robbins had already been caught and had agreed to wear a wire in consideration for a reduced sentence.) Jackson promised this substantial reward if Robbins could bring under the jurisdiction of Robbins' friendly insurance committee an upcoming workers' compensation measure that would abolish the minimum rate law. Over a period of months, Jackson and Robbins discussed the outlines of the deal. Jackson promised to raise the money from the small insurance companies he represented, and who would be wiped out if the workers' compensation minimum rate law were abolished. Jackson solicited donations from several insurance executives, telling them that the money would be used to establish a coalition of similar companies backed by a political action committee.

C. *Racketeering Act 6 and Counts II through X — Mail Fraud and Money Laundering*

Jackson and Robbins sought to avoid the reporting requirements attached to campaign funds. They enlisted the

aid of former senator Paul Carpenter, then serving on the Board of Equalization. Carpenter offered to let Jackson's clients contribute to his campaign committee and then have his campaign committee make payments at Robbins' direction.

Jackson, Robbins, and Carpenter worked out a scheme whereby Jackson had his clients contribute to Carpenter, who, as a member of the Board of Equalization, was relatively immune from criticism for accepting large donations from insurance companies. Carpenter, after taking his cut, would then write checks and mail them to the Goddard Company, ostensibly as compensation for public relations work performed by the Goddard Company. In fact, Jennifer Goddard of the Goddard Co. was a friend of Robbins, did no work for Carpenter, and would merely issue a false invoice to Carpenter in return for the payments. Carpenter carried the lie to the California Secretary of State, mailing mandatory reports characterizing these expenditures of campaign funds as payments for professional services. After taking her cut, Jennifer Goddard would either pass the money on to Robbins directly or spend it on Robbins' personal expenses as he directed.

In all, Carpenter received over $84,000 in contributions from Jackson's clients, at Jackson's request, and passed $78,500 to Goddard, Robbins' front. Checks mailed from Jackson's clients to Carpenter and the false campaign reports mailed from Carpenter to the Secretary of State supported the jury verdict which convicted Jackson of the mail fraud related offenses. The deposit of checks paid by Carpenter to the Goddard Co. supported the verdict which convicted Jackson of racketeering predicated on money laundering.

II. THE BRIBERY-RELATED OFFENSES

A. *The Requirement of a "Quid Pro Quo" Under the California Bribery Statute*

Jackson argues that the predicate state bribery offenses charged in Racketeering Act 4 and Act 5 of Count I, the RICO count, require a showing of an explicit agreement to exchange money for a political favor, a quid pro quo, and the district court's failure to so instruct the jury constitutes reversible error.

1. *Instructions*

Predicate Acts 4 and 5 of the RICO count in the indictment charge Jackson with offering bribes as defined in California Penal Code § 7(6), in violation of California Penal Code § 85.[1]

The district court instructed the jury on bribery, in relevant part, as follows:

No. 27

In order to prove such crime [bribery], each of the following elements must be proved beyond a reasonable doubt:

1. The defendant gave or offered a bribe;

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[1] California Penal Code § 7(6) provides:

> The word "bribe" signifies anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given or accepted, with a corrupt intent to influence, unlawfully, the person to whom it is given in his or her action, vote, or opinion, in any public or official capacity.

California Penal Code § 85 provides:

> Every person who gives or offers to give a briber to any Member of the Legislature, or to another person for him, or attempts by menace, deceit, suppression of truth, or any corrupt means to influence a member in giving or withholding his vote . . . is punishable by imprisonment in the state prison for two, three or four years.

3. The defendant gave or offered such bribe with the specific intent corruptly to influence the other person in his official capacity as to some act, decision, vote, opinion or other proceeding;

No. 28

A "bribe" is anything of value or advantage, present or prospective, or any promise to give any such thing asked, given or accepted, with a corrupt intent to influence, unlawfully, the person to whom it is given in his action, vote, or opinion, in any public or official capacity.

No. 29

The work "corruptly" imports a wrongful design to acquire or cause some pecuniary or other advantage to the person guilty of the act or omission referred to, or to some other person.

No. 31

To constitute the crime of offering a bribe, it is not necessary that any particular words or conduct be used, provided that the means of communication used, viewed in the light of the attending circumstances, is such as to clearly show that a bribe is being offered. . . .[2]

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[2]The operative language of instruction No. 27 is taken from the standard California jury instruction on bribery offenses that parallel § 85. *See,* CALJIC (5th ed.) 7.00 (bribery of an executive officer) and 7.01 (bribery of a ministerial official). All the operative language of No. 28 likewise comes from the definition given in § 7(6). *See,* text of § 7(6) at footnote 1, *supra.* Instruction No. 29 is taken verbatim from CalPenal Code § 7(3) and CALJIC 7.00.5. Finally, instruction No. 31 matches CALJIC 7.07.

The district court's instructions also comport closely with the common understanding of a "bribe" as "a price, reward, gift, or favor bestowed or promised with a view to pervert the judgment or corrupt the conduct

2. *Standard of Review*

[1] "Whether a jury instruction misstates elements of a statutory crime is a question of law and is reviewed *de novo*." *U.S. v. Johnson*, 956 F.2d 197, 199 (9th Cir.1992). There is a great deal of argument in the briefs over whether the plain error or abuse of discretion standard should apply here. Because the issue is whether *McCormick* implies a quid pro quo element into a § 85 offense, the question is one of law, not merely of the wording of the instructions.

[2] The government claims that Jackson failed to preserve the issue with a proper objection and therefore the plain error standard applies. Even absent a formal objection after the rejection of his proposed instruction, Jackson adequately preserved the issue. He argued his quid pro quo point throughout, offered an alternative instruction, and it is clear from the record the court knew of his objection. *See U.S. v. Kessi*, 868 F.2d 1097 (9th Cir.1989) (establishing test to determine whether an issue was adequately preserved absent a formal objection).

3. *Discussion*

The heart of the debate is whether the Supreme Court, in *McCormick v. U.S.*, 500 U.S. 257, 111 S.Ct. 1807, 114 L.Ed.2d 307 (1991), mandates reading a quid pro quo requirement into California's bribery laws. At the jury instructions conference and now in his brief, Jackson argued that the holding of *McCormick* applies to the California bribery charges, requiring the jury to find an explicit promise or agreement between Sen. Robbins and Jackson to exchange money for the performance of an official act.

In *McCormick*, the Supreme Court interpreted the Hobbs Act, which prohibits extortion under color of official right,

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especially of a person in a position of trust (as a public official)." *Webster's Third New Int'l Dictionary* (1986).

and held that a Hobbs Act violation can be found only "if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." *McCormick*, *Id.* at 273, 111 S.Ct. at 1816.

In support of his assertion that *McCormick* applies to the California bribery statute, Jackson relies on *U.S. v. Freeman*, 6 F.3d 586 (9th Cir.1993). He argues that *Freeman* interpreted the *McCormick* quid pro quo requirement as a constitutional limitation on criminalizing campaign contributions. In *Freeman*, the appellant challenged on First Amendment grounds Cal.Penal Code § 68, which makes it a crime for state employees to ask, receive, or agree to receive a bribe. This Court upheld the constitutionality of § 68, saying that "[a]lthough the defendant state representative in *McCormick* was charged with violating the Hobbs Act rather the RICO [with a predicate violation of § 68], the Supreme Court's decision in that case controls this question." *Id.* at 597.

The district court rejected Jackson's argument that without the requirement of a quid pro quo, the jury may have convicted him for exercising his protected speech in ways that, though offensive to lay persons not calloused by years of political traffic, cannot be constitutionally prescribed. The district court reasoned that *U.S. v. Montoya,* 945 F.2d 1068 (9th Cir.1991), limited the *McCormick* decision to the federal extortion statute under review in that case, and specifically ruled that *McCormick* has no impact on California bribery law. The government on appeal contends that the district court was correct, that *Montoya* has already resolved the issue in its favor, and we agree.

Montoya reversed the appellant's Hobbs Act convictions because the jury instructions failed to require a finding of an explicit quid pro quo as mandated by *McCormick*. The appellant then argued that his erroneous Hobbs Act convictions required reversal of his money laundering convictions

predicated on California bribery violations (Cal.Penal Code § 86). We rejected that argument, holding that:

> In defining an essential element of the crime of extortion under color of official right the Supreme Court was interpreting a federal crime under the Hobbs Act. This requirement would have no bearing on the construction of the California bribery statute alleged as the predicate "specified unlawful activity" under Count IV.

Id. at 1075. *Montoya* made clear that *McCormick* was a case of statutory construction. The question whether California bribery law required proof of quid pro quo for statutory reasons or for first amendment reasons was not before us then and was not decided. Those questions remained open two years later when we decided *Freeman*.

[3,4] In *Freeman*, the appellant argued that the RICO statute was unconstitutional as applied in that case "because it chills the exercise of First Amendment rights, namely solicitation of campaign funds." *Id.* at 597. Relying on *McCormick*, we rejected the as applied challenge. Unlike the jury in *McCormick*, the jury in *Freeman* was instructed to find quid pro quo. *Id.* at 594. *Freeman* cited *McCormick* for the proposition that the First Amendment does not protect political contributions made in return for an explicit promise by the official to perform an official act. *Freeman* did not hold the converse, that a failure to require proof of a quid pro quo would violate the First Amendment, and we decline to read such a requirement into First Amendment jurisprudence today. Because the First Amendment does not imply an explicit quid pro quo element into every state bribery offense, and California bribery law does not require an explicit quid pro quo instruction, the absence of one here cannot constitute error.

B. *The Knowledge Instructions was Proper*

The district court defined "knowledge" for the jury in Instruction 30, in relevant part, as follows:

> An act is done knowingly if the defendant is aware of the act and does not act through ignorance, mistake, or accident. The government is not required to prove that the defendant knew that his acts or omissions were unlawful.

This definition closely tracks the definition offered in the Penal Code and the standard jury instructions. *See*, Cal.Penal Code § 7(5) and CALJIC 1.21.

Jackson contends that a § 85 violation requires that the defendant intend to violate a known legal duty. If this is the case, Jackson argues, then the knowledge instruction which specifically states that the defendant need not know the law to be convicted contradicts the instructions defining the elements of a § 85 offense. Jackson further argues that the reconciliation of the two instructions offered by California law and argued by the prosecution renders the definition of a bribery offense hopelessly circular.

1. *Standards of Review*

[5, 6] Whether § 85 requires the defendant to know that his acts were unlawful is a question of law subject to *de novo* review. *U.S. v. Johnson*, 956 F.2d at 199. Because Jackson did not object to the knowledge instruction at trial, this Court reviews the wording of the instructions for contradiction or circularity for plain error only. *U.S. v. Fagon*, 996 F.2d 1009 (9th Cir. 1993).

2. *Knowledge of Illegality Not Required Under Cal.Penal Code § 85*

Because the definition of "bribe" requires a "corrupt intent to influence, unlawfully", Jackson argues that the

defendant must specifically intend to act unlawfully, that is, he must know that his acts are illegal. Given this statutory language, Jackson would have a stronger argument had the California Supreme Court not already foreclosed it. In *People v. Glass*, 158 Cal. 650, 112 P. 281 (1910), the California Supreme Court effectively read the word "unlawfully" out of the bribery statute.[3] In that case, the California Supreme Court held:

> The use of the word "unlawfully" as qualifying "to influence" in subdivision 6 of section 7, adds nothing to the meaning of section 165 . . . There can be no intent to corruptly influence an officer in his official capacity, by giving to him money, that is not an intent to unlawfully influence such officer in such action.

People v. Glass, 158 Cal. at 676, 112 P. 281.

[7] In short, "unlawfully", for purposes of interpreting California bribery statutes, means the same thing as "corruptly"; thus, § 85 requires an intent to influence corruptly only. Contrary to Jackson's argument, a defendant need not intend to break the law to violate § 85. Accordingly, the knowledge instruction did not misstate the elements of § 85 and did not contradict the instructions on the intent required for a § 85 violation.[4]

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[3] In *Glass,* Cal.Penal Code § 165, which prohibits offering or giving bribes to county supervisors, was the subject of review. However, the language of § 165 parallels that of § 85, leaving little doubt that any ruling on the meaning of one section applies to the other. Moreover, the court in *Glass* interpreted the definition of bribe in § 7(6), which is directly at issue in this case.

[4] Jackson also argues that "clear import of recent Supreme Court law is that the defendant in a bribery case must specifically intend to violate a known legal duty." However, the Supreme Court cases Jackson cites for this proposition could have no such import on any plausible reading. In *Ratzlaf v. U.S.*, the Court interpreted statutory language conditioning criminality on "willfully violating" particular code sections. The Court

3. *The Instructions Were Not Circular*

Jackson argues that this interpretation of bribery mandated by the California Supreme Court renders the instructions given hopelessly circular. If "unlawfully" here means the same thing as "corruptly", and the instructions define "corruptly" as meaning "unlawful", the argument runs, the instructions are circular and provide no real guidance to a jury. *See, U.S. v. Dorri*, 15 F.3d 888, 894–95 (9th Cir.1994) (Judge Kozinski dissenting) (discussing the circularity of these instructions and their likelihood to confuse a jury).

Whatever may be the merits of this argument, it has not application to the instructions here.

In this case unlike *U.S. v. Dorri* which Jackson cites, "corruptly" was not defined as "unlawfully", but as "a wrongful design". On these instructions, then, there is no circularity. "Unlawfully" was defined by law as "corruptly" which was defined as a "wrongful design".[5]

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read this language as requiring the defendant to know that he was violating the law. __ U.S. __, 114 S.Ct. 655, 658, 126 L.Fd.2d 615 (1994). The Court in *Ratzlaf* defined the intent requirement of a federal statute prohibiting structuring financial transactions to avoid certain reporting requirements. How the interpretation of this federal statute impacts interpretive issues in California bribery statutes, particularly where those issues have already been settled by the California Supreme Court, is unclear. The relevance of *Staples v. U.S.*, __ U.S. __, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994), is even more remote. The issue in *Staples* was whether a federal statute requiring the registration of certain firearms had any mental state element at all. The Court ultimately ruled that there was a presumed knowledge element, but did not in any way impute that a defendant had to know his acts were illegal to violate the provision.

[5]Most civilizations have understood the wrongfulness of bribery. Judge Noonan has traced the origins of this understanding in the West back to the prophet Ezekiel. *See* John T. Noonan, *Bribes* (1984). In our political culture, bribery ranks with treason as one of the only two crimes

[8] Taken as a whole, the instruction given did not misstate the intent required under § 85, did not contradict the other intent instructions, and did not render the instructions hopelessly circular.

C. *The Entrapment Instruction Was Proper*

At trial, Jackson contended that the government entrapped him into offering the $250,000 bribe charged in Racketeering Act 5. The district court instructed the jury almost verbatim from the Ninth Circuit pattern instruction:

> A person is entrapped when the person has no previous intention to violate the law and is persuaded to commit a crime by government agents.
>
> On the other hand, where a person is already willing to commit a crime, it is not entrapment if government agents merely provide an opportunity to commit the crime.

Jackson now argues that this instruction misstates the law, warranting reversal.

[9] There is no question that the instruction given was imperfect. In *U.S. v. Mkhsian*, 5 F3d 1306, 1311 (9th Cir.1993), we held that an entrapment instruction virtually identical to the one given here was defective due to the ambiguity of the word "already". The imprecision of the term "already" permits a jury to convict without a showing by the government that the defendant was disposed to commit the crime prior to contact with government agents, as required by *Jacobson v., U.S.*, 503 U.S. 540.112 S.Ct. 1535, 118 L.Ed2d 174 (1992).

[10] The consequence of the "already" error is a disputed matter. The government argues that Jackson invited

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specifically mentioned in the Constitution. *See* U.S. Constitution, Art. II, Section 4.

this error, by proposing a similar instruction suffering from the same defect, and then by failing to raise the *Mkhsian* objection to the instruction given. Though the logic of the government's position is sound, in *U.S. v. Lessard*, 17 F.3d 303, 305-6 (9th Cir.1994), we subjected an entrapment instruction with the same defect to plain error review, even though the defendant failed to object. Accordingly, we review the *Mkhsian* error here for plain error.

[11, 12] The faulty entrapment instruction does not rise to the level of plain error in this case. Where the evidence virtually compels a finding that the defendant was predisposed, so that the jury would have found the defendant predisposed under *Jacobson* in any event, no plain error exists. *U.S. v. Davis*, 36 F.3d 1424, 1432 (9th Cir.1994). In the present case, there was extremely strong evidence that Jackson engaged in bribery and money laundering schemes prior to the time Robbins began to act as a government agent. (*See,* discussion of the sufficiency of the evidence *infra.*) More importantly, the jury actually convicted Jackson of bribery, mail fraud and money laundering offenses (the predicate offenses of Racketeering Acts 4 and 6) which occurred before Jackson came into contact with government agents. Because Jackson actually committed a similar bribery offense with the same parties before coming into contact with Robbins in his role as a government agent, there can be no question that Jackson was predisposed to offer a bribe as charged in Act 5 prior to his contact with government agents.

Jackson argues that because the offer of the $250,000 bribe dominated the trial, the instructional error on Act 5 tainted the other convictions. Under Jackson's view, the jurors based their findings that Jackson was guilty of the other, less dramatic and less substantiated offenses on their improper conclusion that Jackson offered a $250,000 bribe. However, there is no reason to believe that the jury improp-

erly bootstrapped up from its conclusion that Jackson committed Act 5 to its conclusion that Jackson committed the other charged crimes. If anything, the jury's not guilty verdicts on the first three charged racketeering acts demonstrate a careful and independent consideration of each offense. Although an improper entrapment instruction may so debase confidence in the judicial process as to constitute plain error in some cases, considering the strength of the government's evidence and the verdicts returned, it does not in this case.

D. *Rejection of Jackson's Proposed Instructions*

1. *Standards of Review*

[13] Whether a district court's rejection of a defendant's proposed jury instruction is reviewed *de novo* or for an abuse of discretion is undecided in the Ninth Circuit. *U.S. v. Zuniga*, 6 F.3d 569, 570 (9th Cir.1993). Because the district court's denial of Jackson's proposed instructions was proper even under the more stringent *de novo* standard, we do not resolve the issue here.

2. *The Instructions on Legal Activity Were Sufficient*

Jackson argues that by refusing several of his proposed instructions describing legal political activity, the district court failed to adequately distinguish bribery from legal activity. Jackson requested instructions stating the legality of lobbying, recommending campaign contributions to specific legislators, soliciting campaign contributions, and receiving political contributions outside the Capitol. The district court did tell the jury in Instruction No. 36, "Making contributions to political campaigns is considered in law to be a form of free speech protected by the First Amendment to the United States Constitution and by the Constitution of California." In Instruction No. 37, the district court defined a "lobbyist" for the jury as "an individual who, for

compensation, engages in direct communication with government officials . . . for the purpose of influencing legislative action." The district court properly rejected the rest of Jackson's proposed instructions describing legal activity as irrelevant to the issues in the case.

a. The Irrelevance of Jackson's Proposed Instructions

[14] The law is clear that "[a] trial judge may refuse an instruction if its language gives undue emphasis to defendant's version of the facts rather than being a statement of appropriate principles of [the] law for the jury to apply to the facts, or if it would tend to influence the jury toward accepting the defendant's version of the facts." *U.S. v. Goland*, 959 F.2d 1449, 1453–54 (9th Cir. 1992). In addition, the district court is not required to give an instruction on a point already adequately covered by another instruction. *U.S. v. Joelzki*, 952 F.2d 1090, 1095 (9th Cir.1991).

[15] As the trial judge properly concluded, the issue is not whether the jury instructions describe what is indisputably legal behavior, but whether the jury instructions adequately define what is illegal behavior. As discussed above, the instructions defining the elements of bribery were adequate. The additional contrast to legal activity offered by Instruction Nos. 36 and 37 was more than adequate to distinguish legal political activity from the illegal conduct outlined by the other instructions. Inclusion of Jackson's other requested instructions on what was indisputably legal activity not in issue could only weight the instructions toward Jackson's theory that all his conduct was legal, and draw the jury's attention away from the real issue of whether the elements of bribery for the RICO count had been shown. Moreover, Jackson had ample opportunity to and did argue to the jury that his behavior was legal. Under a *de novo* or abuse of discretion standard, the district court did not err.

3. *Jackson's Proposed Theory of the Case Instructions Were Unnecessary*

Jackson argues that the district court erred by refusing his proposed jury instructions explaining his general theory of the case, that is, the Jackson "never intended to bribe Robbins but rather Jackson was extorted by Robbins and that Jackson was pretending to go along with a bribe scheme to notify and put off Robbins so as to avoid possible retaliation against Jackson's clients as well as Jackson personally." Jackson's Proposed Instruction Nos. 16, 17, 18 and 19 would have required the jury to acquit Jackson if they found Jackson lacked the intent to offer a bribe either because Robbins extorted or entrapped Jackson.

The district court rejected those proposed instructions, instructing the jury on extortion instead:

> The crime of bribery requires the specific intent to corruptly influence the legislator in his official capacity as to some act, decision, vote, opinion or other proceeding.
>
> Evidence, if any, that defendant Clayton Jackson was extorted by then Senator Robbins may be considered by you in determining whether or not the defendant Clayton Jackson acted with the specific intent to bribe Robbins during the time frame charged in said Racketeering Act Five.

The court instructed the jury on entrapment, in part, "A person is entrapped when a person has no previous intention to violate the law and is persuaded to commit a crime by government agents."

a. The Instruction Given Were Adequate

[16] "It is not reversible error to reject a defendant's proposed instruction on his theory of the case if other instructions, in their entirety, adequately cover that defense

theory." *U.S. v. Dees*, 34 F.3d 838, 842 (9th Cir.1994). The instructions given in this case adequately covered the law on both Jackson's entrapment and his extortion theories. The addition of Jackson's proposed instructions would have merely repeated the specifics of Jackson's theories which Jackson argued for hours in closing, running the risk of biasing the instructions in favor of one party. *U.S. v. Goland*, 959 F.2d at 1453-54.

[17] Moreover, where a defendant's theory turns on lack of intent, jury instructions that accurately reflect the intent required for the offense obviate the need for a specific instruction on innocent states of mind. *U.S. v. Dees*, 34 F.3d at 842. Because the several instructions given on the intent required to offer a bribe correctly stated the law, Jackson's proposed instructions explaining that no crime would be committed if he intended only to mollify Robbins were unnecessary.

The instructions fully and accurately explained the relevant legal standards and Jackson had a full opportunity to argue his case to the jury. The trial court properly rejected Jackson's proposed jury instructions on what is indisputably legal activity, as well as his redundant and argumentative theory of the case instructions.

E. *The Sufficiency of the Indictment*

Jackson argues that the indictment on Racketeering Acts 4 and 5 was insufficient because it failed to allege an explicitly quid pro quo.

[18, 19] This Court reviews the sufficiency of an indictment *de novo*. *U.S. v. Boone*, 951 F.2d 1526, 1542 (9th Cir.1991). An indictment is insufficient if it does not contain the necessary elements of the crime alleged. *Id.* An indictment that tracks the words of the statute violated is generally sufficient, but implied, necessary elements, not present in the statutory language, must be included in an indict-

ment. *U.S. v. Musacchio*, 968 F.2d 782, 787 (9th Cir.1991); *U.S. v. Morrison*, 536 F.2d 286, 289 (9th Cir.1976).

[20] As discussed above, Cal.Penal Code § 85 does not have an explicit quid pro quo element. The statutory language describes the sort of implicit quid pro quo that is the essence of bribery — the offer of something of value with the intent to influence corruptly. Because the statutory language, like the instructions given, adequately states the elements required, and the indictment here incorporates the relevant statutes, the indictment is sufficient.

F. *Sufficiency of the Evidence to Convict on Racketeering Act 5*

Jackson finally argues that the evidence of the bribe offer charged in Racketeering Act 5 was insufficient to sustain his conviction. The evidence consisted of tape recorded conversations between Jackson and Robbins. Sufficiency was for the jury to decide.

[21, 22] There is sufficient evidence to support a conviction if, "reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). Circumstantial evidence and inferences drawn from it may be sufficient to sustain a conviction. *U.S. v. Reyes-Alvarado*, 963 F.2d 1184, 1187 (9th Cir.), *cert. denied*, 506 U.S. 890, 113 S.Ct. 258, 121 L.Ed.2d 189 (1992).[6]

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[6]The government argues that because Jackson did not renew his motion for acquittal at the close of his case, the sufficiency of the evidence is reviewable only for plain error. However, the district court did not rule on Jackson's acquittal motion until after the jury returned its verdict. Jackson's assertion that the motion remained pending until the close of his case, obviating any need to reassert the same motion, seems

[23, 24] First, Jackson points to the fact that the $250,000 bribe was never given, suggesting that the money must have been delivered to sustain a conviction predicated on a § 85 violation. As the district court instructed the jury, however, whether a bribe was actually delivered is irrelevant to the issue of whether a bribe was offered in violation of § 85. *People v. Ah Fook*, 62 Cal. 493 (1881) (tender or production of bribe not required). There is no doubt a rational jury could have convicted Jackson on the evidence presented. The FBI caught Jackson on tape asking Robbins to bring workers' compensation legislation under the jurisdiction of Robbins' committee and then offering a "quarter" as payment for Robbins' help when Robbins asked for a "quantification" of the insurance companies' interest. Robbins explained in his testimony that the "quarter" Jackson offered was a $250,000 bribe that Robbins would receive in exchange for routing pending legislation to his friendly committee. Jackson himself admits that he understood Robbins to be discussing bribery. In short, the tape recordings of Jackson's dealings with Robbins create a record replete with unseemly discussions of a $250,000 payment in exchange for a political favor, of who will come up with that payment, and whether they will keep quiet. The recordings even include a remarkably frank recognition by Jackson of past crimes, of Jackson's and Robbins' shared understanding based on that illicit past, and their ongoing need to avoid federal investigation.

As Jackson argues, the jury could have concluded that Jackson lacked the intent to offer a bribe on this record. However, the jury was also free to take Jackson at his word on the taped conversations and reject Jackson's protestations that he had his fingers crossed when speaking on the tape and has only begun to tell the truth when defending himself

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correct. The issue was, therefore, adequately preserved and the above standard of review applies.

against criminal charges in court. Indeed, the district court found Jackson's in-court testimony incredible and increased his sentence on that basis.

III. OFFENSES RELATED TO MAIL FRAUD AND MONEY LAUNDERING

Jackson asserts that the prosecution pursued theories of mail fraud and money laundering outside those charged in the indictment, creating a host of instructional and evidentiary problems. In a nutshell, Jackson argues that on the money laundering counts, the indictment requires the prosecution to prove that Jackson knew that the donations he solicited were routed to Robbins through the Goddard Company, and that the money routed to Robbins was for Robbins' personal use. Regarding the mail fraud counts, Jackson contends that the prosecution had to prove that Jackson knew of the mailings charged in the indictment. Jackson asserts that the district court erred in 1) rejecting Jackson's proposed instructions that would have clarified these requirements; 2) failing to give unanimity instructions to ensure that all the jurors agreed to the same theory and particular act to convict Jackson; and 3) allowing the convictions to stand where the proof presented diverged from the acts charged in the indictment, rendering the evidence insufficient to sustain convictions on the charged offenses. In fact, the prosecution did not argue any theory outside the scope of the indictment, vitiating most of the instructional and evidentiary problems Jackson asserts. The few remaining shortcomings do not rise to the level of reversible error.

A. *Background: The Indictment*

In general, the indictment described the scheme through which Jackson would channel money from his insurance clients to Robbins. Jackson would solicit donations from his

insurance clients to Carpenter's campaign fund, deceiving his clients both as to the real beneficiary of their donations, and Carpenter's political status. (Jackson did not tell his clients that Carpenter was no longer in the Senate and currently served on the Board of Equalization where he would have little, if any, voice in insurance policy.) After taking his cut of the action, Carpenter would issue checks to Goddard Co. and report these campaign fund expenditures to the Secretary of State as public relations expenses. In fact, Goddard Co. performed no work for Carpenter, other than issuing phony invoices. Jennifer Goddard of Goddard Co. would then either pass the cash on to Robbins directly or spend the money as Robbins directed, after, of course, taking her cut.

Count I, the RICO count, Racketeering Act 6 charges Jackson with mail fraud, 18 U.S.C. §§ 1841 and 2, and money laundering or aiding and abetting money laundering, 18 U.S.C. §§ 2 and 1956(a)(1)(A)(i) and (B)(i). Racketeering Act 6 charges six specific mailings, each a check payable to Carpenter from one of Jackson's insurance clients. Under the money laundering charge, the indictment alleges thirty acts, each a check payable to the Goddard Co. from Carpenter's account. Any single instance of mail fraud or money laundering alone could constitute Racketeering Act 6.

Count II charges Jackson and Carpenter with conspiracy to commit mail fraud and money laundering for their roles in the same scheme to pass donations from insurance companies through Carpenter and Goddard to Robbins as a bribe. This count lists Jackson's solicitations of various insurance companies to donate to Carpenter as Jackson's overt acts in furtherance of the conspiracy. The indictment lists Carpenter's overt acts as the numerous checks written by Carpenter to the Goddard Co., along with Carpenter's campaign statements mailed to the Secretary of State which

mischaracterize these expenditures as payments for professional services.

Counts III through X charge Jackson with specific acts of mail fraud. Counts III and IV are based on the mailing of two checks from Jackson's insurance clients to Carpenter. (These checks are also listed as specific acts of mail fraud in Racketeering Act 6 of Count I.) Counts V through X are based on the Carpenter campaign reports mailed to the Secretary of State.

The jury convicted Jackson of Counts II through X, as well as Racketeering Act 6 of Count I, on both the mail fraud and money laundering prongs.

B. *Mail Fraud-Related Offenses*

1. *Claimed Instructional Errors*

The instructional errors on the mail fraud counts Jackson asserts are premised on the government arguing and presenting evidence on a theory of misrepresentation not charged in the indictment. Jackson contends the government improperly argued that Jackson fraudulently solicited donations to Carpenter from his clients by concealing or misrepresenting the fact that Carpenter was no longer a state senator.

Far from being a distinct scheme outside the ambit of the indictment, this fraud argued by the government was an integral part of the scheme charged in the indictment. As Robbins explained in his testimony, the prosecution argued to the jury, and the district court concluded, the fact that Carpenter was no longer in the senate where he would be voting on insurance matters allowed Carpenter to serve as a political heat shield for Robbins. Robbins understandably feared the political consequences of openly taking large sums from the powerful insurance interest. The parties believed Carpenter, who now served on the Board of Equalization, on the other hand, could accept the hefty donations

without drawing any scrutiny or sanction because he no longer was directly involved with insurance issues. In this way, Carpenter, an apparently disinterested third party, provided cover for the whole scheme. There can also be little doubt on the record here that if the insurance executives understood that Carpenter was not in the state senate or that their money would be passed on to Robbins, they would not have made the donations Jackson requested.

[25, 26] Furthermore, the indictment includes this defrauding of Jackson's clients as part of the overall scheme charged. With only slight variation, the indictment alleges in every count:

> *As part of the scheme to defraud and to obtain money by means of false pretenses, defendant CLAYTON R. JACKSON induced unsuspecting lobbying clients to make campaign contributions to Paul Carpenter's campaign committee,* when the defendant CLAYTON R. JACKSON then and there well knew that a substantial portion of the said contributions were not actually for the benefit of Paul Carpenter, but were in actuality to be routed through Paul Carpenter for the direct and indirect benefit of Alan E. Robbins.

(emphasis added). Jackson's argument that this language does not encompass Jackson's misrepresentation of Carpenter's political status to his clients when soliciting these donations simply slices the bologna too thin. Indictments should not be read so narrowly that they must explicitly include every particular argument or bit of evidence a prosecutor may offer at trial.

a. Unanimity Instructions Not Required

Jackson argues that because the prosecution presented two mail fraud schemes, the district court erred by not giving a unanimity instruction which would ensure that the jurors all agreed upon the same scheme. Jackson also argues

that a unanimity instruction was necessary to guarantee that all the jurors agreed upon the same mailing of the several mailings alleged in Racketeering Act 6. Because Jackson did not request a unanimity instruction at trial, the district court's instructions on this matter are reviewed for plain error.

[27, 28] Where the proof at trial shows more than one scheme, "the jury must be instructed that each of the jurors must find the defendant guilty of participation in the same single scheme to defraud and that the scheme ... is the same scheme as the overall fraudulent scheme in the indictment." *U.S. v. Mastelotto*, 717 F.2d 1238, 1247–48 (9th Cir.1983). Here, however, there was no need for a unanimity instruction. As discussed above, only one scheme, the scheme charged in the indictment, was presented to the jury. There can also be no doubt that all the jurors agreed to at least two of the mailings alleged in Racketeering Act 6. The mailings charged in Count III and IV are the same as those charged in Mailing Acts 5 and 6 in Racketeering Act 6. Because the jurors unanimously agreed upon the mailings in Count III and IV, convicting Jackson on those counts, the jurors necessarily unanimously agreed upon these same two mailings in Racketeering Act 6, removing any possible prejudice Jackson suffered due to the lack of a unanimity instruction. Also, conviction on any of the money laundering acts is also sufficient to convict on Racketeering Act 6, so if the money laundering conviction is proper, there would be no prejudice suffered from a bad instruction on mail fraud.

Finally, even if a unanimity instruction were required in either instance, it would not be plain error. *See, Griffin v. U.S.*, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991); *U.S. v. Castro*, 887 F.2d 988, 993 (9th Cir. 1989).

b. Rejection of Jackson's Proposed Instruction

[29, 30] Jackson claims that the district court erred by rejecting his Proposed Instruction No. 23 that he argues "would have emphasized" the scheme charged in the indictment. Again, because the scheme argued was the scheme charged in the indictment, there was no need for a special instruction to distinguish schemes. Moreover, Jackson's proposed instruction is almost a verbatim recitation of the language in the indictment describing the scheme before every count. While it is true that a trial court's failure to orally instruct a jury on the elements of the charged offense cannot be cured by making a written indictment available to the jury, Jackson does not argue that the instructions did not adequately define the elements of the offense. Rather, Jackson can argue only that his redundant instruction would have offered emphasis of a particular theory. *Guam v. Marquez,* 963 F.2d 1311, 1314 (9th Cir.1992). This lack of emphasis does not render the instructions taken as a whole improper.

2. *Sufficiency of the Evidence to Convict on Mail Fraud Counts V Through X*

[31] Jackson argues that there is no evidence that he knew that Carpenter mailed campaign reports to the Secretary of State, the acts which form the basis of Count V through Count X. Although there is no direct evidence that Jackson knew of specific mailings, there is more than ample evidence from which a rational jury could infer Jackson's knowledge.

The whole aim of the arrangement was to get the bribe money to Robbins without having to report or otherwise expose the fact that Robbins was accepting substantial gifts from Jackson's insurance clients. In order for the scheme to work, Carpenter would have to falsify the campaign reports accounting for the money that was channelled to Robbins.

There was evidence that Jackson was fully informed on the scheme and aware of the laws requiring reporting of campaign fund expenditures. Jackson discussed the need to avoid these reporting rules with Robbins on numerous occasions. *See* discussion below regarding evidence that Jackson knew of the scheme. During one of the recorded conversations, Robbins and Jackson even discussed the benefits of finding a campaign committee through which to filter the bribe money, and both seemed to recognize with glee that they had used Carpenter and his campaign fund for this purpose in the past.

C. *The Money Laundering Offense*

Jackson argues that in order for the jury to convict him of the money laundering charges in Racketeering Act 6, the prosecution had to prove that Jackson knew of the Goddard Co.'s role in the scheme and also knew that the money transferred to Robbins was for Robbins' personal use. Because the instructions did not require the jury to find and the proof did not demonstrate that Jackson had this knowledge, Jackson argues, the jury could have improperly convicted Jackson based on the transfer of funds from his clients to Carpenter or on a legal intercandidate transfer of money from Carpenter's campaign fund to Robbins' campaign fund.

1. *Claimed Instructional Errors*

[32, 33] Jackson asserts that the district court erred in denying his proposed instruction requiring the jury to find that Jackson knew the money funneled to Robbins was for Robbins' personal use. As the district court correctly concluded, the crime of money laundering, as charged, does not demand such a finding. The district judge properly instructed the jury that they must find that Jackson knew the money transferred "represented the proceeds of bribery and/or mail fraud" to convict him of money laundering. The

question then becomes whether the instructions regarding the underlying crimes of mail fraud and bribery were proper. The instructions were proper and neither crime requires a finding that Jackson knew Robbins put the proceeds to personal use.

Jackson also repeats the argument here that the trial court erred in rejecting his Proposed Instruction No. 23. Again, this instruction is redundant with the indictment and theories argued to the jury. The absence of this instruction, which merely stresses a charge in the in the indictment, cannot render the instructions taken as a whole inadequate.

Jackson also raises arguments for unanimity instructions on the money laundering charges that parallel his mail fraud contentions. As discussed in the mail fraud sections, the scheme the prosecution argued and proved was the same scheme outlined in the indictment. The transfer of funds from Jackson's unsuspecting clients to Carpenter was an integral part of the overall plan to launder Robbins' bribe. Because there was only one scheme argued and shown, no unanimity instruction was necessary to ensure that the jury all agreed upon the same scheme.

[34] Jackson's claim that a unanimity instruction to ensure that all the jurors agreed upon the same financial transaction among the thirty alleged in the indictment has more teeth, but does not depict a case of plain error.[7] The money laundering prong of Racketeering Act 6 charges Jackson with thirty separate acts of money laundering. To convict Jackson, all the jurors had to agree that Jackson was culpable for the same particular act, but the court did not give a unanimity instruction to this effect.

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[7] As with his mail fraud argument, Jackson did not request a unanimity instruction below, so this Court reviews the absence of a unanimity instruction for plain error only.

[35] However, any harm resulting from this error could not so undermine confidence in the jury's verdict to constitute plain error. Each of the thirty specific transactions charged in Racketeering Act 6 is a check paid by Carpenter to the Goddard Co. Though many separate checks are listed, they all document the same part of the money laundering scheme. Therefore, as the government argues, if Jackson is culpable for one check, he would be culpable for all of them. Jackson may be correct that there should have been a unanimity instruction here, but its absence does not constitute reversible error.

2. *Sufficiency of the Evidence on Money Laundering*

[36] Jackson recasts the argued instructional errors as challenges to the sufficiency of the evidence with the same results. He makes the baseless assertion that there is no evidence that he knew of the Goddard Company's role in the scheme. First, it is not necessary that the evidence establish that Jackson actually knew of Goddard Co. The evidence need only show that Jackson initiated, concluded, or participated in the initiation or conclusion of the transaction to support a conviction on the substantive offense. *U.S. v. Castaneda*, 16 F.3d 1504, 1511 (9th Cir.1994). Even if Jackson did not know the specific identity of the middle man between Carpenter and Robbins, the evidence is clear that he was instrumental in arranging the transaction. At a minimum, Jackson initiated the transaction by fraudulently soliciting donations from his clients to Carpenter. *See, U.S. v. Manarite*, 44 F.3d 1407 (9th Cir. 1995), *as amended* (March 15, 1995) (discussing generally the elements and evidence required to substantiate a money laundering offense).

[37] The evidence can be even weaker to sustain a conviction for aiding and abetting money laundering, which the indictment also charges in Racketeering Act 6. To convict Jackson on the aiding and abetting charge the jury

needed to find only that "(a) the crime was committed, (b) the defendant knowingly and intentionally aided, counseled, commanded, induced, or procured another person to commit the crime, and (c) the defendant acted before the crime was completed." *Id.* It is not necessary for an aider and abetter to know who actually committed the crime. *Id.* at 1512. The entire course of the recorded conversations between Robbins and Jackson evidence Jackson's role as instigator of the deal and advisor to Robbins on how to conduct the deal, establishing aiding and abetting liability even absent any evidence that Jackson knew of Goddard Co.

Furthermore, although there is no direct evidence Jackson knew of Goddard Co. by name, there is plenty of evidence from which a rational jury could infer that Jackson was well aware of Goddard Co. Robbins testified that Carpenter said he would work out the details of the laundering scheme with Jackson. Robbins further testified that shortly thereafter both Jackson and Carpenter confirmed that they had met and worked out the details.

IV. ISSUES ON APPEAL NOT RAISED AT TRIAL

Jackson's amicus briefs have raised a number of interesting abstract questions, but as they were not presented to the trial court, we have no occasion to speculate about them in deciding whether there was reversible error in this case.

V. CONCLUSION

Jackson was caught on tape engaged in behavior so antithetical to and destructive of our political traditions that there can be no serious argument that Jackson is an innocent man convicted by a jury whose real problem was prejudice against the democratic process. Jackson's bribery, money laundering, and mail fraud schemes provide such a clear and extreme case of corruption that there is no danger

that legitimate lobbyists could confuse First Amendment political expression with the type of behavior for which Jackson was convicted. Jackson's convictions in no way undercut our nation's commitment to the First Amendment freedoms to lobby and make donations to political causes. The verdict casts no aspersion on the legitimate role professional lobbyists may play in facilitating the exercise of political freedom. If Jackson's convictions, based as they are on the overwhelming evidence amassed by the state and the well-articulated laws of California, chills any activity, they can only chill behavior that is plainly corrupt and plainly proscribed by law.

Because there is no requirement of an explicit quid pro quo under Cal.Penal Code § 85, there was no error in the instructions or evidence on the bribery-related charges. Because the prosecution argued and proved only one money laundering and mail fraud scheme, the scheme charged in the indictment, the instructions were proper and the evidence sufficient on the mail fraud and money laundering charges. Any other shortcomings in the evidence of instructions did not rise to the level of reversible error. Accordingly, we AFFIRM.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

CLAYTON JACKSON,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

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Los Angeles Times, April 29, 1993, A3, col. 1 14

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

CLAYTON JACKSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

INTRODUCTION AND INTEREST OF AMICI

This case implicates, and the decision below threatens, fundamental rights bestowed on all citizens by different provisions of the federal constitution. Under the First Amendment, all citizens have the right to petition for the enactment of legislation furthering their interests and reflecting their policy choices. In our democratic system, "from the beginning of the Nation," one form that such constitutionally protected conduct has taken is "private contributions or expenditures" supporting particular legislators or candidates. *McCormick v. United States,* 500 U.S. 257, 273 (1991).

Secondly, citizens have a constitutional right under the Fifth Amendment's due process clause to be free from governmental schemes to entrap them in criminal conduct which they were not predisposed to engage in prior to being subjected to the government's inducements. *Jacobson v. United States,* 112 S.Ct. 1535 (1992).

Finally, under the Tenth Amendment and Republican Form of Government clause, citizens have a right to a state government that operates free of control by the federal sovereignty within the areas reserved to the states by the Constitution of the United States. *See, e.g., New York v. United States,* 505 U.S. _____, 112 S.Ct. 2408 (1992) (federal government cannot conscript state governments to act as its agents in areas outside federal government's constitutionally enumerated powers or in manner which infringes on sovereignty of states reserved by Tenth Amendment). Likewise, state legislatures are entitled to conduct their business free of unwarranted federal interference. *Davids v. Akers,* 549 F.2d 120, 127 (9th Cir. 1977) (federal court ought not to interfere with the procedural operation of a state legislature, because the Tenth Amendment restricts its power over "[t]he conduct of integral government functions").[1]

The Ninth Circuit's decision in *United States v. Jackson, as amended,* 72 F.3d 1370 (9th Cir. 1995), constrains the vigorous exercise of the rights to speech, petition, and association that all citizens, including political lobbyists, enjoy. Furthermore, in this case, the federal government took control of a key state legislator and maintained him in office for the sole and exclusive purpose of actuating a scheme to criminalize political discussion, a stratagem both

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[1] *Davids* cited a Supreme Court decision that has since been overruled, but there is no indication that *Davids* would have been decided differently had that case not existed.

repugnant to the First Amendment and violative of the Fifth and Tenth Amendments. Review of the decision below is mandated in a case of such importance.

This brief is filed on behalf of amici profoundly concerned with the issues raised by the *Jackson* case. The Committee of Concerned Governmental Affairs Specialists consists of a group of professional governmental affairs specialists. Its members are individuals with extensive experience in both politics and law. Most have been involved in lobbying the California Legislature for over twenty years; several are members of the California State Bar. The group includes individuals who have served as members of the California Senate and Assembly. The chair and counsel of the committee, George Zenovich, is both a former member of the California Senate and retired justice of the California Court of Appeal.

As governmental affairs specialists, members of this group have represented and do represent a wide spectrum of interest groups active in California political affairs including, as a representative sample, manufacturing, agriculture, insurance, franchise, construction, and government entities, as well as pharmacists, professional associations, service industries, and small business retailers. In pursuing a profession that is both honorable and necessary to the effective functioning of the business of government, committee members must interact with, and seek to influence, elected officials. Governmental affairs specialists are entitled to guidance on the boundary between advocacy which the Constitution blesses and that which the criminal law may punish, and to protection from prosecutorial practices that unfairly seek to convert the former into the latter. The *Jackson* decision puts the liberty of governmental advocates in jeopardy.

The second group of amici consists of present and past members of both houses of the California Legislature. These Senators and Assembly members, both Democratic and

Republican, have served on dozens of legislative committees and collectively have contributed centuries of dedicated service to California's state government.

They include Senator Nicholas Petris, who has served in the State Assembly and Senate since 1959; Senator Alfred E. Alquist, a member of the California Legislature since 1962; Senator Ralph Dills, a member of the California Legislature for fifty-six-years; Senator Milton Marks, who has served in the California Legislature since 1967; Senator Hershel Rosenthal, who has served in the California Legislature for over twenty years; and Senator Newton Russell, who has served in the California Assembly and Senate since 1964.

Former legislators joining as amici include Senator Marz Garcia, Senator John Foran, Senator John Knox, Senator Edward Davis, Senator Ollie Speraw, Assemblywoman Sunny Mojonnier, Senator Peter Behr, Assemblyman Jerry Eaves, Senator Robert Presley, and Senator James Mills.

These legislators have an enduring interest in the protection of California's constitutional right to an independent and republican form of government free from undue interference by the federal executive.

STATEMENT OF FACTS

The facts are set forth in Jackson's petition for certiorari. We summarize only those facts relevant to the issues which we urge before this Court.

In 1986, the FBI began investigating suspected corruption in the California legislature. The operation involved federal infiltration into the state's legislative process. In related cases, federal agents set up fictitious corporations with FBI agents posing as businessmen, introduced fake bills into the California legislature, and sought support for the fake bills through illicit payments to legislators and legislative staff.

The F.B.I. actually got one piece of legislation enacted, then told the governor to veto the bill because it was a fake, but persuaded him to keep the entire matter secret so the federal agents could reintroduce the fake bill in the next legislative session.

The phase involving Senator Robbins began in 1991. Robbins was then Senator for the 20th District of California, as well as chairman of the Senate Insurance, Claims and Corporations Committee. Robbins had held his seat for over eighteen years and had chaired the Insurance Committee since 1981. He was also chairman of the Committee on Government Efficiency and a member of the Banking and Commerce Committee, the Budget and Fiscal Review Committee, and the Transportation Committee.

On June 4, 1991, Robbins agreed to plead guilty to racketeering and tax evasion charges at a later date and, in the meantime, to cooperate with the FBI and the U.S. Attorney in exchange for a considerably reduced sentence.

From early July, 1991, through November 13, 1991, Senator Robbins was an agent of the federal government, directed by Assistant United States Attorney John Vincent and Special Agent James Wedick of the FBI. During this period, Robbins secretly recorded his conversations with Jackson.

Jackson, a managing partner for the San Francisco law firm of Sullivan, Roche & Johnson, was a principal in the firm SRJ Jackson/Barish & Associates, a lobbying group representing, among others, various insurance industry interests.

On November 21, 1991, with the legislature in recess, Robbins resigned his office, and a short time later pleaded guilty to racketeering and tax evasion. In recognition of his central role in securing Jackson's indictment, Robbins' sentence was reduced from five years to two years.

Jackson was indicted in February, 1993, and convicted in December, 1993, on one count of racketeering, one count of conspiracy to commit mail fraud and money laundering, and eight counts of mail fraud. Aside from Robbins' testimony, Jackson's conviction rests largely on the tape-recordings made by Robbins when he was functioning in his dual capacity as a state senator and as an agent of the federal executive.

During the almost five months that Robbins was an agent of the federal government, he remained a Senator and chairman of the Insurance Committee. Over this period, Robbins cast numerous votes, chaired regular meetings of the Insurance Committee, issued many committee reports with recommendations as to the disposition of bills submitted to the Committee, and was otherwise involved in conducting the business of the Senate and of the State.[2] Neither his colleagues in the legislature nor any other member of the state government was aware that he was permitted to remain in the state Senate by the FBI for the sole purpose, to use Agent Wedick's words, of "working off a beef."

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[2]Records of the California Senate establish that while serving as a federal agent Robbins cast in excess of one hundred votes on pending legislation.

REASONS FOR GRANTING CERTIORARI

I. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE NINTH CIRCUIT'S RULING IS AT ODDS WITH FIRST AMENDMENT FREEDOMS OF SPEECH, PETITION, AND ASSOCIATION.

A. Freedoms of Speech, Petition, And Association.

Lobbying[3] is political speech and as such is secured by the First Amendment. While this Court has recognized that lobbying is protected by the First Amendment, it has not fully delineated the extent of this protection.[4] Lower courts,

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[3] Webster's Ninth New Collegiate Dictionary provides the following definition of lobbying:

> [T]o conduct activities aimed at influencing public officials and esp. members of a legislative body on legislation . . . to promote (as a project) or secure the passage (as legislation) by influencing public officials . . . to attempt to influence or sway (as a public official) toward a desired action.

Thus stripped of its invidious connotations, lobbying can be seen for what it is: a manner of exercising the rights of speech and, in particular, of petition. Not surprisingly, lobbying "in one form or another has been with us from the beginning . . . . It has, indeed, been so deeply woven into the American political fabric that one could, with considerable justice, assert that the history of lobbying comes close to being the history of American legislation." Lane, *Lobbying and the Law* 18 (1964).

[4] *See Rumely v. United States*, 345 U.S. 41, 48 (1953) (Federal Regulation of Lobbying Act (the "Act") authorizing investigation of lobbying activities, however remote "the radiations of influence" they exert on the legislative process, raises doubts of constitutionality in view of First Amendment prohibitions); *United States v. Harriss*, 347 U.S. 612, 625 (1954) (construing the Act so as not to infringe upon lobbyists' First Amendment "freedom[s] to speak, publish and petition the Government"); *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 138-139 (1961) (declining to construe the Sherman Act as applicable to lobbying activity because it "would raise important constitutional questions. The right of petition is one of the

however, have articulated the existence of specific constitutional protection for lobbying.[5]

Whatever the specificity of this Court's statements on the subject, there can be no doubt "[d]iscussion of public issues" is "integral to the operation of the system of government established by our Constitution," and that "[t]he First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' " *Buckley v. Valeo*, 424 U.S. 1, 14 (1975), quoting *Roth v. United States*, 354 U.S. 476, 484 (1957). It follows that lobbyists, whose very livelihood depends upon the "discussion of public issues" and the direct petitioning of government officials, may rightly claim the full breadth of First Amendment protections.

Constitutional protection for lobbying activities is also embraced within the freedom of association guaranteed by

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freedoms protected by the Bill of Rights . . . "); *see also United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965) (First Amendment protects concerted efforts to influence public officials).

[5] *See, e.g., Liberty Lobby v. Pearson*, 390 F.2d 489, 491 (D.C. Cir. 1968) ("[w]hile the term 'lobbyist' has become encrusted with invidious connotations, every person or group engaged . . . in trying to persuade Congressional action is exercising the First Amendment right of petition"); *Moffet v. Killiam*, 360 F.Supp. 228 (D. Conn. 1973) ("The mere fact . . . that one earns a living by exercising First Amendment rights does not vitiate the ability to assert those rights . . . one does not forfeit First Amendment rights because he pays someone to exercise them for him."); *see also United States v. Margiotta*, 688 F.2d 108, 128-129 (2nd Cir. 1982), *cert. denied*, 461 U.S. 913 (1983) ("the activities of lobbyists and others who seek to exercise influence in the political process are basic in our democratic system"). For its part, the California Supreme Court recognizes that lobbying is an exercise of the First Amendment right of petition. *Fair Political Practices Commission v. Superior Court*, 25 Cal.3d 33, 46-49 (1979) (upholding registration and disclosure laws, but finding transaction reporting requirement "[c]onstitutes an unnecessary curtailment of the right to petition").

the First Amendment. The language and the reasoning employed in the cases involving "associational privacy" support such protection. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (statute compelling teachers to disclose organizational affiliations invalidated because even legitimate and substantial governmental purpose "cannot be pursued by means that broadly stifle fundamental liberties when the end can be more narrowly achieved"). Any doubts on the applicability of this doctrine to the regulation of political speech were put to rest in *Buckley*. *See* 424 U.S. at 64; *see also Service Employees International Union v. Fair Political Practices Commission*, 955 F.2d 1312, 1322-1323 (9th Cir.), *cert. denied*, ____ U.S. ____, 112 S.Ct. 3056 (1992) (ban on inter- and intra-candidate transfers of political contributions violates First Amendment because it discriminates against challengers and contributors who wish to associate themselves with them).

Regardless of the label chosen or the formula applied, the Constitution clearly protects lobbying, including the making of campaign contributions, as an exercise of fundamental rights. Indeed, because lobbyists are engaged in speech, petition, and association activities which are by their very nature political, they enjoy the broadest protection from government interference.

B. The Ninth Circuit's Approval Of Jackson's Bribery-Related Convictions, In The Absence Of A Quid Pro Quo Instruction, Offends The First Amendment.

The indictment here alleged Jackson "knowingly and intentionally gave and offered to give a bribe" to Robbins as defined in California Penal Code § 85. The charge then was modified by the following definition:

> [s]pecifically, defendant CLAYTON R. JACKSON gave and offered to give a campaign contribution to influence Alan E. Robbins in connection with pending legislation . . . .

This allegation, as phrased and without more, simply does not describe an illegal act. The language used connotes a lawful campaign contribution. It *could* describe a bribe, but only if a quid pro quo is supplied by the reader. Yet the adverb "specifically" implies that what is to follow is the gist, the factual essence of what constitutes the "bribe" under California Penal Code § 85.

This language does not come close to describing a contribution "made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." *McCormick v. United States*, 500 U.S. 257, 111 S.Ct. 1807, 1816 (1991). In *McCormick*, the Court ruled that no Hobbs Act violation occurs unless a contribution is given in exchange for an explicit promise of official action, as opposed to a contribution made with a general expectation of favorable official action: "To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law *but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation.*" *Id.* (emphasis added).

The "quid pro quo" requirement announced in *McCormick* must be applicable to California Penal Code § 85. To the extent the statute may criminalize constitutionally protected activity, the "quid pro quo" standard must be met to ensure that the distinction between a lawful campaign contribution and a bribe is preserved. The Ninth Circuit's ruling to the contrary is simply insupportable.[6]

The absence of a *quid pro quo* charge here was made worse by the trial court's refusal to give defense instructions which correctly addressed the First Amendment issues. Among the instructions refused, the following were of particular importance:

- *Proposed Jury Instruction No. 3:* "The fact that Defendant Jackson made recommendations to lobbying clients as to the making of campaign contributions to legislators expecting to gain special access or influence, or with a general expectation of benefitting himself or his clients does not, without more, constitute bribery."
- *Proposed Jury Instruction No. 4:* "Before a campaign contribution to an elected official may be found to be an illegal bribe, there must be clear evidence that the payment was made in return for an explicit promise or undertaking by an official to perform or not to perform an official act. In other words, a quid pro quo exists, and a bribe may be found, only where the official asserts that his official conduct will be controlled by the terms of the promise or undertaking."
- *Proposed Jury Instruction No. 6:* "Soliciting political contributions—communicating with others to seek their

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[6] As Jackson's petition for certiorari makes clear, although the Ninth Circuit appears to recognize the *quid pro quo* issue is one of first impression, its legal analysis is confined to a single conclusory sentence: "[W]e decline to read such a [*quid pro quo*] requirement into First Amendment jurisprudence today." *Jackson*, 72 F.3d at 1376.

ideological and financial support for a political cause—is also protected by the Constitution. California law does not limit the amount of such contributions that any individual, entity or corporation may make as long as the California Political Reform Act as to the reporting of the expenditure and receipt on campaign contributions is complied with."

These instructions were crucial to proper deliberation of the issue of what constitutes an impermissible quid pro quo as opposed to a generalized anticipation of favorable official action.

The jury in this case was permitted to conclude that campaign contributions given in legitimate ways for legitimate purposes could be equated with bribes. After *Jackson*, a lobbyist who recommends to a client the making of a campaign contribution or, for that matter, any citizen or organization who makes such a contribution, risks conviction under vague and unconstitutional standards by which Jackson was found guilty.

This Court's review of this critical convergence between First Amendment protections and federal criminal law is now required.

II. IN LIGHT OF THE GOVERNMENT'S INVESTIGATIVE TACTICS IN THIS CASE, THE RULING BELOW ON THE ENTRAPMENT ISSUE IMPERMISSIBLY CHILLS LOBBYISTS IN THE FREE EXERCISE OF THEIR FIRST AMENDMENT RIGHTS, RAISING A QUESTION WORTHY OF THIS COURT'S REVIEW

This is not a case in which a legislator, after being approached by a lobbyist (or citizen) with a bribe or other corrupt offer, reported that illegal advance to law enforcement authorities, and then agreed to gather evidence through the use of a wire. Had it been, the subsequent

revelation of the investigative technique logically would "chill" only those who might intend to initiate illicit discussions with legislators.

Here, Alan Robbins was a legislator of great power with whom lobbyists and all interested in legislative issues affecting insurance had to deal. Yet, at a certain point, he ceased the pursuit of the legislative function bestowed upon him by the vote of his constituents, and remained in office solely for the purpose of reducing his well-earned criminal sentence by ensnaring an advocate whose duty to his clients required him to hold discussions of pending legislation with Robbins. The F.B.I. directed Robbins to initiate discussions of money with the advocate, although the advocate himself did not raise that topic. So directed, Robbins embodied the dangers for Jackson that the California Supreme Court touched upon in *People v. Bunkers*, 84 P. 364 (Cal. 1905) ("A rebuff to the bribe seeker, gives rise to dangers, born of resentment, which are scarcely capable of estimation").

The chief danger of such an investigative scheme is the threat of undeserved criminal investigation and prosecution which may deter many groups and individuals from engaging in constitutionally protected activity and some even from entering the lobbying process. *See United States v. Nofziger*, 878 F.2d 442 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1003 (1991) (Court of Appeal "disinclined" to treat subsection of Ethics in Government Act as imposing strict liability "[b]ecause of its potential for chilling speech"). "If the government's interpretation . . . were correct, a prudent man would avoid even permissible lobbying" because the government's construction of the statute "[c]ould convert what he believed to be a permissible communication into a felony"). *Id.* at 454.[7]

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[7]The Seventh Circuit was alert to this danger in a slightly different context. In *United States v. Craig*, 528 F.2d 773, 779 (7th Cir. 1976),

Here, prudence would make a legislative advocate suspect that any legislator with whom he must deal may be concerned not at all with the merits of legislation, but with securing the advocate's indictment. Indeed, newspaper accounts offer vivid evidence of the effect which the government's investigation has had on the California legislature:

> "We're operating on the theory that everybody's wired," says one staffer, referring to recording devices. Another political veteran observes: "Anytime you know there are people wearing wires around town, that is inevitably going to change relationships. What are you going to do, frisk your friend before lunch?"

Los Angeles Times, April 29, 1993, A3, col 1.

Aware of the *Jackson* holding, a prudent person would fear far more than being detected in the tendering of quid pro quo offers to legislators. The advocate could not avoid conviction by following the *McCormick* rule: i.e., by making sure that he did not seek an explicit promise in exchange for his client's support of, or campaign contribution to, the legislator. Rather, he would have to be certain that his attempt to influence legislation could not be deemed "wrongful", a term left to be defined by prosecutor or jury. Needless to say, in such circumstances constitutionally protected forms of speech, such as promises of continued

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the court held that in the Hobbs Act prosecution of a state legislator, the legislator enjoyed a speech or debate privilege derived from federal common law. The Court noted that "[a] legislator in considering whether to support or oppose a proposed law must be free to reflect on the merits; he must not be deterred from advocating a position by the threat of prosecution by a hostile executive. The evil is the fact of deterrence[.]" *Id.* at 778. It is similarly true that a lobbyist should not be restrained from vigorously advocating his or her position out of fear of criminal prosecution. It is in this context that the threat of deterrence and that of selective enforcement most dangerously intersect.

support for a legislator and his positions, will necessarily be deterred.

Moreover, *Jackson* removes another safe haven for good-faith political advocates: their lack of predisposition to bribe. Prior to *Jackson*, even if a lobbyist could not prevent a legislator "working off a beef" from linking pending legislation and contributions in their discussions, he or she could not be convicted in the absence of any prior history of corruption that would justify his or her being subjected to such inducements. *Jacobson v. United States*, 112 S.Ct. 1535 (1992); *United States v. Stenberg*, 803 F.2d 422, 429 (9th Cir. 1986) (The "manufacture . . . of new crimes from start to finish is constitutionally unacceptable."). *Jackson*, however, permits conviction based on nothing more than speech without a finding of predisposition on the defendant's part to bribe, making governmental advocacy a truly hazardous calling.

Approval of the tactics employed by the government in this case will chill not only lobbyists, but also potential contributors in exercising their right to associate with the candidate or cause of their choice. Passive contributors, as much as active political participants, may find their safest course to be abstention from the political process.

The tactics of the government, if condoned, will serve to retard the free and vigorous public debate of issues and policies which is the touchstone of the American political system. Those among the most actively and directly engaged in political advocacy will simply forego the exercise of their First Amendment rights or fail to take full advantage of the breadth of First Amendment protections. For these reasons, a grant of certiorari is in order.

III. THE FEDERAL GOVERNMENT'S INVESTIGATION AND PROSECUTION OF SUSPECTED CORRUPTION IN THE STATE LEGISLATURE FLOUTS THE SAFEGUARDS PROVIDED BY THE TENTH AMENDMENT AND THE REPUBLICAN FORM OF GOVERNMENT CLAUSE

In securing Jackson's indictment, the Federal Bureau of Investigation and the United States Attorney intruded improperly into the processes of the California legislature.

- Federal agents gathered evidence of racketeering and tax evasion against Alan E. Robbins, an incumbent state senator and chairman of a powerful committee, leading to his admission of felonious conduct and abuse of his office, conduct which disqualified Robbins from further service as a state senator. The agents, however, persuaded Robbins to plead guilty at a later date and meanwhile to act as their undercover agent in return for a considerably reduced sentence.

- For a period of five months, federal agents withheld from the Senate and citizens of California the fact that Robbins was guilty and had agreed to plead, thereby thwarting state recall and vacancy-filling provisions of the California Constitution and the disciplinary procedures of the Senate.

- Federal agents required Robbins to devote his loyalty and attention to them, thus compromising further his capacity to perform as a state senator. Surely this situation altered Robbins' votes, performance on committees, and relationships with his colleagues and constituents.

- In related cases, federal agents set up fictitious corporations with FBI agents posing as businessmen, introduced fake bills into the California legislature, sought support for the fake bills through illicit payments to legislators and legislative staff, actually got one piece of legislation en-

acted, then told the governor to veto the bill because it was a fake, but persuaded him to keep the entire matter secret so the federal agents could reintroduce the fake bill in the next legislative session.

The FBI has threatened future investigations of this kind with the FBI assuming the role of political police: "This is not over. The FBI is going to continue it; in fact, we'll in a sense be a lobbyist for the citizens of California." (Statement of Richard Ross, Special Agent, FBI Sacramento Office contained in transcript of press conference by George O'Connell, United States Attorney for the Eastern District of California, held April 27, 1993).

There is no doubt that the federal government may investigate and prosecute state officials, including legislators, for violations of federal criminal laws. Nor is there any doubt undercover agents may be used. "As [this Court's] cases emphasize, however, even when Congress has decided to engage in some regulation of the state governmental officials, concerns of federalism play a vital role in evaluating the *scope* of the regulation." *Evans v. United States,* 119 L.Ed.2d 57, 89 (1992) (Thomas, J., dissenting). There is a difference in kind, not in degree, when federal agents begin to subvert the state legislative process itself through such means as the direction of state legislators in the performance of their duties, the introduction of fake bills, and the like.[8]

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[8] "The Constitution creates a federal system of government .... [S]tate legislatures acting within the scope of their powers perform a function as vital to the governance of the state as the role Congress fulfills with regard to the nation as a whole .... While it is within the province of the United States Attorney to prosecute local officials who violate federal law, the primary responsibility for ferreting out their political corruption must rest, until Congress directs otherwise, with the State, the political unit most directly involved."
United States v. Craig, 528 F.2d 773, 778-779 (7th Cir. 1976).

The principle of federalism inheres in the very structure of the Constitution and finds expression in provisions such as the Tenth Amendment, the doctrine of enumerated powers articulated in Article I, Section 8, and the federal guarantee to the states of a republican form of government in Article IV, Section 4. As Alexander Hamilton stated, "[t]he . . . Constitution, so far from implying the abolition of the State governments . . . leaves in their possession certain exclusive and very important portions of sovereign power." *The Federalist,* No. 9 at 76 (C. Rossiter ed., 1961).

For that reason, the courts have long recognized areas reserved to the states' exclusive control. States alone hold the power to prescribe the qualifications of their most important government officials, *Taylor v. Beckham,* 178 U.S. 548, 570-571 (1900), the power to determine the location of the state capitol and to appropriate funds for that purpose, *Coyle v. Oklahoma,* 221 U.S. 559, 565 (1911), and the power to regulate local elections. *United States v. Bowman,* 636 F.2d 1003, 1011 (5th Cir. 1981); *see also, James v. Bowman,* 190 U.S. 127, 142 (1902) (invalidating federal bribery law as applied to purely local elections on the ground that Congress lacked the power to regulate such elections).

The principle underlying these and similar cases is at stake here. The federal government has never before conducted an investigation by such extensive covert interference with a state legislature and secret frustration of state laws. These surreptitious actions interfered with the functioning and independence of the California legislature and the rights of California's citizens. If the FBI can dictate a state legislator's other actions in return for a reduction in the legislator's pending sentence, why can they not dictate his vote on pending legislation as part of his "working off his beef?" The government's tactics flout California's sovereignty, and are by themselves sufficient to warrant this Court's scrutiny.

The federal government has conducted an undercover operation that utilized a sitting state senator to engage a lobbyist in discussions presumptively valid under the First Amendment. The Ninth Circuit has inestimably compounded the threat to First Amendment rights posed by the nature of the investigation and prosecution of the case by approving a blurring of the line between legitimate campaign contributions and bribes. While we must be vigilant against the corruption of our public officials as well as of those who attempt to corrupt them, our vigilance should not come at the expense of our defining liberties. "The potential for abuse, of course, is particularly grave in the inherently political context of public-corruption prosecutions." *Evans,* 119 L.Ed.2d at 90 (Thomas, J., dissenting).

CONCLUSION

In view of the importance of the issues raised herein and in Jackson's petition, Amici respectfully submit that a grant of certiorari is appropriate.

Dated: April 12, 1996

Respectfully submitted,

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